82-5987

PETITION FOR WRIT OF CERTIORARI TO A COURT OF APPEALS

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SUPREME COURT, U.S.

HERBERT LEE RICHARDSON
petitioner

VS.

STATE OF ALABAMA
Respondent

Circuit Court of Houston County.

U.S. SC No._____

PETITION FOR WRIT OF CERTIORARI

TO THE UNITED STATES SUPREME COURT:

Comes your petitioner, Herbert Lee Richardson, and petitions this Court for a Writ of Certiorari to issue to the Court of Criminal Appeals of Alabama in the above styled cause under Rule 19 (A)(2) and Rule 22, (1), of this Honorable Court, reversing the judgment for the following reasons:

A. This is a second appeall of a death sentense by way of Writ of Error Coram Nobis in the Court of Criminal Appeals of Alabama. The first appeal of this case is officially cited as, Richardson V. State, Ala. Cr. App. 376 So. 2d. 205 (1978) and as Ex Parte; Richardson V. State, Ala. 376 So. 2d. 228, (1979) in the Alabama Supreme Court. The decision now appealed from is unofficially cited as Richardson V. State, Ala., 4th Division, Number 956, Ala. Cr. App., June 29, 1982. All of the above cited decisions and opinions are herein attached.

B. The jurisdiction of this Court is invoked upon the follow-- ing concise statements of the grounds:

(1.) The date of the judgment sought to be reviewed is June 29, 1982, in the Alabama Criminal Court of Appeals, 4th Division, Number 956.

Rehearing to that Court was denied on July 27,1982.

(2.) Petition for Certiorari in the Alabama Supreme Court was filed and denied on October 1,1982,without an opinion. This was a denial by a State Court of last resort in a Criminal case and ;

(3.) As such, is within the statutory provisions believed to confer on this Court jurisdiction to review this judgment pursuant to Rule 22 (1), by Writ of Certiorari and pursuant to Rule 19(1), (A)-(B).

Q. The questions presented for review are as expressed below;

(1). Whether the Alabama Court of Appeals correctly held that the challenge to the warrantless and warranted search of petitioner,s vehicle on constitutional grounds of "the six exceptions to the warrant requirement" on his direct appeal, are the same as a constitutional challenge to the vehicle searches on grounds that"the affiant used false statements knowingly and intentionally, and with reckless dis-- regard for the truth to support probable cause for his two vehicle searches in petitioner's Writ of Error Coram Nobis," ?

(2). Whether the warrantless vehicle search and the warranted search of the same vehicle,later at the police station,can be sustained where it later appears during the direct appeal of the ensuing case , that the averments of the affiant in support of probable cause, affidavit or otherwise, has been traversed by trial testimony of the same state witnesses relied on to support probable cause?

(3). Whether the warranted search of petitioner's home can be sustained where the vehicle search led to the house search and inforderived thereof, was used to support probable cause for the house search in that warrant affidavit?

(4). Whether the warranted search of petitioner's home can be sustained where the officer supplying information formulating probable cause for the search, had deliberately perjured himself in a

prior unrelated search warrant affidavit, can now be considered a "reliable person" for purposes of supplying information supporting probable cause for the search of petitioner's home and where there is evidence within that warrant affidavit itself, of his continued deliberate falsehoods ?

(5). Whether the prosecutor's involvement in the warrant procedures raises to constitutional magnitude in violation of petitioner's right to counsel in this case where the prosecutor participated in preparing affidavits used to secure search warrants, participated in petitioner's arrest without a warrant, participated in the investigation at the crime scene and therefore, marking the commencement of " a criminal prosecution ?."

(6). Whether the appellate court constitutionally upheld petitioner's sentense of death by holding that there was no evidence of a lesser included offense presented at his original trial that would have supported a lesser offense conviction, and where lesser offense evidence was precluded by law at petitioner's trial and would not have been admissible during the trial , nor could it be argued as a defense to the capital murder charge and where the evidence at trial did not negate the possibility that petitioner could have presented evidence of a lesser offense had he not been unconstitutionally precluded this option at his trial as a defense ?

B. THE constitutional provisions and statutes which this case involves, are cited as they relate to the questions as presented above ;

(1). Questions (1) through (4), as presented above, directly involves the U.S.C.A. Constitution, FOURH Amendment rights and U.S.C.A., Constitution, Fourteenth Amendment.

(2). Question (5), as presented above, directly involves the U.S.C.A., Sixth Amendment rights and U.S.C.A., Constitution, Fourteenth Amendment.

(3). Question (6), as presented above , directly involves

the U.S.C.A.,Constitution, Fourteenth Amendment , U.S.C.A. Constitution, Eighth Amendment, U.S.C.A.,Constitution, Sixth Amendment.., The Code of Ala.,Sec.,13-11-2(1975). "The indictment ssssshall not include ang lesser offenses". And the Code of Ala.,Sec.13a-5-31(1975),"the Felony murder doctrine not to be used to supply intent."

(E),(F), and(I), A concise statement of this case containing the facts material to the consideration of the questions presented for review of this state court judgment are as written below ; with references to the afore cited and hereto,attached,opinions to ascertain the grounds ;

On August 16,1977, Rema Mae Gallins was killed by a bomb at her home,129 East North Street,Dothan,Alabama, at about 8:30 A.M..

The Dothan police dept. investigated the crime scene collecting evidence and taking statements of witnesses. The District Attorney of Dothan, Al.,Tom Sorrell , was also present at the crime scene. Detect ive Sgt.Locke and D.A., TOM SORRELL, left the crime scene going to Abbeville, AL., to arrest the petitioner where he worked, some 30 miles away from Dothan , AL., and return him to the Dothan jail. Petitioner's vehicle was searched by the bomb squad and the Dothan police while parked where petitioner left it in Dothan and rode to work with his co-workers to Abbeville, Al.. The vehicle search occurred at about 1:00 o' clock p.m., on August 16,1977 , without a warrant after petitioner's arrest. The vehicle was searched again after it was taken to the police dept. and a search warrant obtained with the aid of D.A. Tom Sorrell. Evidence seen from the first search was used to obtain the search warrant for the second search and evidence removed. The District Attorney and Sgt. Locke, then went to Hartford, Al. to obtain a warrant to search petitioner's home and remove evidence found there.

On the basis of evidence removed from petitioner's vehicle, his work clothes and the search of his home ,petitioner was convicted of capital murder. Petitioner appealed his conviction and raised the issue

of ''whether the first warrantless search of his vehicle was within the six exceptions to the warrant requirement. See App. 2., section 2 and 3 of page 213.

Secondly, petitioner attacked the sufficiency of the warrant affidavit used to search his home. Claiming that Deputy Hand had misrepresented the true source of his information supporting that warrant affidavit. See App. 2., page 213.

Thirdly, petitioner attacked the constitutionality of the Alabama Code, 1975 Death penalty statute. See App. 2, page 223.

All of the above contentions were denied on direct automatic appeal of this case by both the Alabama Criminal Court of Appeals and the Alabama Supreme Court. See App. 3, page 228.

It was during the course of petitioner's appeal to the Alabama Supreme Court that petitioner, himself, discovered from the criminal court of appeals' opinion that the information used by police supporting probable cause for his arrest, the vehicle searches and the search of his home, was clearly traversed by the testimony of the state's own witnesses at trial. Petitioner immediately submitted a pro se brief to the Alabama Supreme Court requesting a remand to the trial Court for a hearing on the issue of "intentional and reckless use of false statements by police to support probable cause." See App. 2, page 229.

(1.) After the Alabama Supreme Court affirmed the conviction, petitioner filed this Writ of Error Coram Nobis in the trial Court stating the same facts. See App. 1, at page 5. At the Writ hearing, held on Sept. 18, 1981, the trial court refused to allow petitioner the opportunity to "fully and fairly" question the affiants of these searches and present evidence on the issues. From the Writ hearing, at R-58, Capt. Stokes, the affiant officer of the first and second search of petitioner's vehicle, was being questioned concerning statements by him in support of probable cause. The following occurred:

Mr. Herring. (Q) Do you recall talking with someone concerning a post card that had been received by Mrs. Wynn the day before?
Capt. Stoke. (A) No, sir.
(Q) I will ask you to read paragraph 8. of your affidavit.
(A) (witness does as instructed).

Mr. Sorrells: Judge, we object again, on page 73, 74 and 75 of the motion to suppress, the very same questions were asked and answered at that

time. Now, we are talking about three years later and....-

THE COURT: I made it clear that we are not retrying this case again. I sustain the objection. That was litigated before.

Mr. Herring: Okay.

(2.) The Court repeatedly denied petitioner an opportunity to challenge and present proof that the affiant intentionally falsified his warrant affidavit in support of probable cause for the search of petitioner's vehicle. Paragraph 8. of the officer's affidavit is shown on page 212, of App. 2., where he states falsely that the post card message said "that this daughter would have an unhappy birthday on August 16,1977." "August 16,1977 is in fact the birthday of that daughter."

The actual message of that card did not state this daughter "Would have" an unhappy birthday on August 16,1977 ,nor was August 16,1977 , in fact the birthday of this daughter as falsely sworn to by officer Stokes in his warrant affidavit. At APP. 2., page 219 , the true message is shown as having stated the following;

"I had a great time , I wish you an unhappy birthday,"

The bomb incident occurred on the morning of August 16,1977 and officer stokes was clearly but falsely indicating that petitioner implicated the bombing would occur on the birthday of this daughter and make her unhappy. Ms. Wyms actually received the post card on her birth day which was not on August 16,1977 but on August 15,1977 ,the monday before the bombing . At the Writ hearing, Ms. Wyms was called to state her birthday for the record. At (R-38)

Mr. Herring :(Q) Do you recall...Well, before we get into that, what is your birthday ?

Ms. Wyms (A) August 15...

(Q) Okay, and when did the bombing occurrence occur ?

(A) The sirteenth..

Officer Stokes intentionally falsified his warrant affidavit in support of probable cause to search petitioner's vehicle since he had personally talked to this witness prior to ang of his searches, at the crime scene. Officer stokes stated at paragraph 8. of his warrant affidavit as shown in App. 2., page 212, that:

"Herbert Lee Richardson had within the last 6 weeks threatened to kill . Mrs Remus Callins,*******

Mrs. Remus Callins was the mother of the victim and she testified that petitioner "had never threatened her" . See App. 2., at page 222, and from the trial transcript, page 446, Vol. 3.

Mr. Herring: (Q) Did he(petitioner) ever make any threats to you ?
Mrs. Remus Callins. (A) NO, he didn't.

The warrant affidavit supporting the two searches of petitioner's vehicle are false ; by the affiant and petitioner did raise a dif - ferent issue to the search of his vehicle in this Writ of error than that raised on automatic direct appeal regarding the same vehicle sea - rch. See App. 2., page 213.

The trial court and the appellate courts of Alabama have deliberate- ly refused to apply "the preponderance of the evidence test " in determ- ining the materiality of the affiant's intentionally made false state - ments as this Court ruled in Franks V. Delaware, 57 L.ED. 2d. 667(1978).

Petitioner has no other recourse for redress of these infringeme - nts of his constitutionally protected rights in the state courts below and will lose his life if this Honorable Court does not decide this issue. The courts of Alabama intentionally discriminate against a de - fendant having a sentense of death by not affording him equal protect - ion of constitutional rights as it does a defendant with a lesser sen - tense and the same identical trial error.

(E) In Waters V. State, Ala. Cr. App. 360 So.2d. 347 , a concealing stolen property case , the appellate courts of Alabama held a warrant invalid where " officer Locke's statement in his warrant affidavit comparing a stolen typewriter to one seen by him in the defendant's home was complet- ely invalid, where officer Locke had no description of the prior stolen typewriter and where the two typewriters were later shown not to be a match as falsely claimed by officer Locke. See App. No.A., page 356 to 357.

Officer Locke is the same officer who submitted the false inform -

ation supporting probable cause for the search of petitioner's home in this case . See App. 2., page 209., paragraph 4. of the warrant affidavit where officer Locke states:

4."he personally saw pipe that was identical Pipe to that was used in the bomb, also pipe of this description was seen in the truck that Richardson used on his job."

Whether officer Locke saw identical pipe to pipe used in the bomb on petitioner's job in the truck is the material statement. Petitioner's co - worker, David Seay, testified that only pipe the size of 2½ inch was being used that day on petitioner's job. See App. 2., at page 218.

The largest size pipe found at the bomb scene was 2. inch pipe according to police reports. See App. 2., at page 216 .

Officer Locke was intentionally misrepresenting the truth in this warrant affidavit since he was at the crime scene and had himself stated the pipe was 2 inch that compose the bomb and admittedly , he talked to petitioner's co-worker, David Seay, and had learned that pipe used on petitioner's job was 2½ inch and not "identical" to a 2 inch pipe.

At App. 2. page 209, paragraph 3. of officer Locke's affidavit he swears that Randy Callins told him "he saw a bomb on his front porch." The trial transcript and Appendix 2. page 215 , Randy testifies that he never told the police he saw a "bomb" on his front porch .. (trial transcript at page 42 , vol. I.)

Mr.Herring:(Q) Did you tell them(police) you saw a bomb or a package ?
Randy Callins:(A) A package .
Mr.Herring:(Q) A package ? Okay, do you know what was in the package ?
Randy Callins:(A) NO .

Other evidence at trial reveals that the package Randy saw was not the alleged bomb as falsely misrepresented in officer Locke's warrant affidavit for the search of petitioner's home.

(4.) It follows that since officer Locke had intentionally misrepresented the truth in another warrant affidavit , some eleven months prior to his giving the information in support of the search of petitioner's home , he could not be ""a reliable person " as stated in this warrant affidavit . See App. 2., at page 209 .

""I have received information from a reliable person,***""

The facts show that officer Locke was unreliable , even as a police officer,, in giving information supporting probable cause for a search warrant when his prior history and his present history of intentionally falsifying the facts are considered together. This issue is a novice issue and should be considered by this Court since police officers are normally viewed as " reliable persons "by virtue of their jobs.

(5) The fact that the District Attorney was involved in the warrant process to a degree of relaying the information supporting the search of petitioner's home and being at the residence during the search itself ,, was enough to cast the search as being more than investigatory, since his involvement "marked the commencement of a criminal prosecution" to which the explicit guarantees of the sixth Amendment are applicable. Kirby V. Illinois, 406 U.S. 689, 92 S.ct. 1877,1882, 32 L.ED. - 2d. 411.(1967) .

This Honorable Court has never decided whether the prosecutor's complicity in the arrest ,, the preparing of warrant affidavits and the processes normally considered "police functions" ,would or would not invoke the guarantees of the sixth Amendment , as the Fifth Circuit Court of Appeals has intimated that it would .See Lomax V. State of Ala., 629 F.2d. 413(1980)

The record of petitioner's case is repleted with evidence of the prosecutorial forces of the state having focussed on petitioner during his arrest by the prosecutor,the preparing of the warrant affidavit used to search petitioner's vehicle and the warrant affidavit used to search petitioner's home. See App. I., at page 3.

(6) In this case , petitioner's death sentence was upheld on the basis that he did not present any evidence of a less serious offense at his trial and is therefore, not entitled to a new trial under this Court's holding in Beck V. State ,447 U.S. 625, 65 L.ED. 392, 100 S.ct. 2382.

Hopper V. Evans ,Number 80--1714 ,May 24,1982 , was decided by

this Court , while petitioner's writ appeal was still pending in the Alabama Criminal Court of Appeals and that holding applied to petitioner's case . The holding in Hopper V. Evans, supra, concluded that Evans' own evidence at his trial negated the possibility that he could have presented evidence of a lesser offense , since he pleaded guilty to capital murder and confessed that he killed the victim .

Your petitioner did not confess to killing the victim and did not plead guilty to capital murder . Plus, the evidence at petitioner's trial did not negate the possibility that petitioner could have presented evidence of a lesser offense had it not been for the preclusion clause barring such evidence .

It is fundamentally unfair for the state to first tell petitioner that there is no lesser included offense and then later urge that his death sentence should be upheld because he failed to present evidence which would prove a lesser included offense . See App. I., at page IO .. Because the preclusion clause did exist prior to petitioner's trial, it limited petitioner's right to counsel in preparing for the trial itself. The preclusion clause limited trial strategy , the selection of evidence to be used , and its presentation at the trial , it limited the request for certain charges , it limited the argument of counsel at trial , it limited certain objections and it limited every aspect of the options normally available to a defendant at non-capital trials in the state of Alabama .

Unless this Honorable Court finally puts this issue to rest , the state of Alabama will apply Hopper V. Evans , supra, to all the remaining un-tried pre-Beck , supra, death penalty cases and deny petitioner and others , due process of law .

All of the issues herein raised , are of great importance and are inconsistent with this Court's prior Rulings in similar cases.

This Court's acceptance of this case, would insure consistent and equal application of the law in the state of Alabama and other states .

Petitioner, humbly, ask this Honorable Court to accept this case and decided the important issues it raises to this Court .

Most Respectfully Submitted,

Herbert L. Richardson

Pro Se

Herbert Lee Richardson
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JUN 29 1982

THE STATE OF ALABAMA - - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 1981-82

4 Div. 956

Herbert Lee Richardson

v.

State

Appeal From Houston Circuit Court

JOSEPH J. MULLINS, Retired Circuit Judge.

This appeal is from a denial of a petition for a writ of error coram nobis seeking to set aside appellant's 1978 conviction

APPendix # 1.

for murder and a sentence of death. His original conviction was appealed from the Houston County Circuit Court to this Court, and on October 3, 1978 the case was remanded to the trial court with instructions. On November 21, 1978, following remand, it was affirmed by this Court, and on December 19, 1978 rehearing was denied. Richardson v. State, Ala. Cr. App. 376 So. 2d 205. The Supreme Court of the State of Alabama granted certiorari to review appellant's conviction on the ground that it was a death case. Rule 39 (c) ARAP, and on September 28, 1979 affirmed the judgment of the Court of Criminal Appeals. On November 6, 1979 petition for rehearing in the Supreme Court was denied. The Supreme Court in affirming the holding of the Court of Criminal Appeals stated that "petitioner's allegations of error: (1) That the initial warrantless search of petitioner's automobile was illegal; (2) That the search of appellant's home was conducted pursuant to an improperly issued search warrant. We find no merit in either contention made by the petitioner." The Supreme Court carefully reviewed the record and found that petitioner's conviction is adequately supported by the evidence. Ex Parte Richardson v. State Of Alabama, Ala. 376 So. 2d 228.

We shall not recite the facts of the crime in this record because they are fully set out in the opinion of this Court in the case of Richardson v. State, Ala. Cr. App. 376 So. 2d 205.

On April 10, 1981 the petitioner, Herbert Lee Richardson, filed a petition for a writ of error coram nobis in the Circuit Court of Houston County, Alabama. On April 16, 1981 the district attorney of the 20th. Judicial Circuit of Alabama filed a motion

to dismiss the petition for writ of error coram nobis filed in this cause. On July 2, 1981 the petitioner filed a supplementary amendment to the petition for a writ of error coram nobis. On July 16, 1981 the trial court entered an order appointing a competent attorney to represent the petitioner, setting the time and place for a hearing on the petition, and the motion to dismiss the petition, and directing the Warden at Holman Prison to have the petitioner present so that he and his attorney may present such evidence as may be proper in said cause. On the 18th. of September, 1981, with the petitioner, and his counsel, and the state, and its counsel, present in open court, a hearing on the petition was had.

Petitioner's evidence consisted of five witnesses and two exhibits. Petitioner's first witness, Thomas W. Sorrells, district attorney for the 20th. Judicial Circuit, State of Alabama, testified, in substance, as follows: That he participated in the investigation that led to the arrest, trial, and conviction of the petitioner; that he accompanied the police to Abbeville to pick up the petitioner, who had been arrested, and to talk to petitioner's fellow employees, and to look around the site where the petitioner had been working; that he did participate in the obtaining of a search warrant for the petitioner's house in Hartford, Alabama; that he related the information given him by Sergeant Lock to Judge Block; that at that time the petitioner was in custody in Dothan; that he was present in the area, but did not participate in the actual search of petitioner's house; that he was not present when petitioner's vehicle was searched.

The petitioner testified, in substance, that the pipe on

his job site was all two and a half inch pipe; that two and a half inch pipe would be the inside size of the pipe, and that three inches would be the outside diameter of the pipe; that all pipe at the job site was galvanized; that the only pipe he recalls being at his house was three-quarter inch pipe, and it was not galvanized. On cross-examination petitioner admitted that he was not present when the officer found pipe at his home, and that the pipe described by the police was approximately two inch pipe; that these facts about the size of the pipe came out at his trial.

Doris Weems, petitioner's next witness, testified, in substance, that she went to the scene of the bombing on the 16th. day of August, 1977; that she spoke with some officers whose names she did not know, and told them that she had seen a pipe in the petitioner's car; that she did not recall whether she had told the police about any statements petitioner had made to her since the bombing occurred several years ago.

Petitioner's next witness, Harold Lock, a Dothan police officer, testified, in substance, that he was involved in the investigation which led to the conviction of the petitioner; that the pipe found at the job site where petitioner worked, and the pipe found at petitioner's home were similar to the pipe found at the bomb scene; that the pipe used in the bomb and the pipe found in petitioner's yard both had threads on one end; that Randy Collins had seen a bomb on the front porch immediately after petitioner left the scene of the bombing; that the pipe in the debris of the bomb was broken and twisted, and that he estimated the size of the pipe used in the bomb to be two to two and a half inches, galvanized,

and the same type of pipe found at appellant's job site and home.

Petitioner's next witness, L. E. Stokes, a Dothan police officer, testified, in substance, that he obtained a search warrant for petitioner's car; that Randy Collins told Stokes that he saw something on the steps of the house after the petitioner left the scene, but could not recall Collins' description of it.

Petitioner's exhibit one is a drawing of a two-inch galvanized pipe. Petitioner's exhibit two is a drawing of a carbon steel pipe, and a galvanized pipe with nipples on them.

On September 18, 1981 at the conclusion of the evidence offered by the petitioner on his petition for writ of error coram nobis, the trial court being of the opinion that the evidence did not establish that petitioner was entitled to a writ of error coram nobis, therefore, the petition was dismissed. Appellant gave notice of appeal to this Court on September 22, 1981, and requested permission to proceed in forma pauperis, and pro se.

The petitioner contends in his brief that he is entitled to a new trial because: First, that the search warrants issued to search his vehicle and to search his home were issued under false affidavits. Second, that he has been denied his right to an attorney during the preliminary stage of the proceeding when the district attorney was actively involved in the prosecution of the case on the day of the occurrence. Third, that he is entitled to a new trial under the decision rendered in the Beck case. Beck v. State Of Alabama, 447 US 625, 65 L ed 2d 392, 100 S Ct 2382.

The appellant's first contention in his brief is that he should be granted a new trial because: (1) The affidavits used to

obtain the search warrant for his automobile; and (2) The affidavits used to obtain the search warrant for his home were false. This issue was fully submitted by the appellant to the trial court, and there adjudicated, and upon appeal to this Court from his conviction, was affirmed by this Court. See Richardson v. State, Ala. Cr. App. 376 So. 2d 205, and again confirmed by the Supreme Court of Alabama. See Ex Parte Richardson, Ala. 376 So. 2d 228. This Court will not adjudicate again the same issues that have already been adjudicated between the same parties, over and over again on an application for a writ of error coram nobis. Richardson v. State, supra; Ex Parte Richardson, supra; Summers v. State, Ala. Cr. App. 366 So. 2d 336; Ex Parte Rudolph, 276 Ala. 392, 162 So. 2d 486; Cert. Den., 377 US 919, 84 S Ct 1185, 12 L ed 188; Impson v. State, Ala. Cr. App. 339 So. 2d 1098. We hold that the matters of the validity of the search warrants have been fully adjudicated, and the appellant may not again adjudicate them by this petition for a writ of error coram nobis.

The appellant's second contention is that he has been denied his right to an attorney during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day of the occurrence.

We have diligently searched the original petition for a writ of error coram nobis filed in this cause on April 10, 1981, and the amended petition filed July 2, 1981, and do not find a fact stated in the petition, or amended petition, that the appellant was at any time denied the right of counsel, nor do we find any

evidence in the transcript of the hearing on the petition from which a conclusion could be drawn that the appellant was denied right to counsel. We only find the statement in the transcript of the hearing, made by appellant's counsel to the court, that appellant contends that: "Under the Lomax case, which is cited in his petition, that he has been denied his fourth amendment rights, and his rights to an attorney, during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day that the occurrence happened that gave rise to the indictment." The appellant was represented by counsel at his original trial, and on appeal from his original trial, to this Court, and in the Supreme Court of Alabama. Appellant was represented by counsel at the hearing in the trial court in this case and, on request of the appellant, is represented pro se on this appeal.

We hold that in the absence of an averment in the petition for the writ of error coram nobis, that the appellant was denied assistance of an attorney at his original trial, and in the absence of any evidence showing a denial of the appellant's right of counsel at his original trial, the trial court did not err to the prejudice of the appellant when it did not grant him a new trial on the ground that he was denied counsel. Petitioner must aver facts, in his petition for a writ of error coram nobis which, if proven, would entitle him to the writ, and on the trial he must prove such facts. Summers v. State, supra; Corley v. State, Ala. Cr. App. 397 So. 2d 223; Cert. Den., Ala. 397 So. 2d 225.

The third contention contained in appellant's brief is that he is entitled to a new trial because of the opinion of the United States Supreme Court rendered in the case of Beck v. Alabama, 447 US 625, 65 L ed 2d 392, 100 S Ct 2382, decided June 20, 1980.

Appellant avers in his petition that the United States Supreme Court ruled in Beck v. State that: "The death sentence may not be constitutionally imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of a lesser included offense of a non-capital nature."

The appellant was convicted under Code Of Alabama, 1975, Section 13-11-1. - Section 13-11-9. Section 13-11-2. (a) (9) provides for the death or life imprisonment without parole for the: "willful setting off or exploding dynamite or other explosive under circumstances now punishable by Section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;"

We quote from Beck, emphasis supplied.

> "We granted certiorari to decide the following question:
>
> 'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict?' 444 US 897, 100 S.Ct. 204, 62 L.Ed.2d 132.
>
> "We now hold that the death penalty may not be imposed under these circumstances."

We note that the Beck case specifically held that a death sentence may not constitutionally be imposed after a jury verdict of

guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict. In the case of Joseph S. Hopper, Commissioner, Alabama Department Of Corrections and James D. White, Wardan, Petitioners, v. John Louis Evans, III, Number 80-1714, released by the Supreme Court Of The United States, May 24, 1982, Chief Justice Burger said:

> "Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence warrants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if 'there is any reasonable theory from the evidence which would support the position.' Fulgham v. State 291 Ala. 71, 75, 277 So. 2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given 'if the evidence would permit a jury rationally to find (a defendant) guilty of the lesser offense and acquit him of the greater.' Keeble v. United States, 412 U. S. 205, 208 (1973). The Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.'"

Chief Justice Burger further stated in Hopper v. Evans, supra: "The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction of the offense of unintentional killing during this robbery was therefore not warranted."

The appellant's petition for a writ of error coram nobis

in this case does not aver that the petitioner was entitled to an instruction of a lesser included offense. There is no evidence before this Court that the petitioner was entitled to have the jury instructed on a lesser included offense. [There is no evidence before this Court that the evidence presented to the jury at the original trial of the petitioner would have supported a conviction of a lesser included offense.] The evidence fully supports the jury verdict that the petitioner intended to kill the victim. We hold that the preclusion clause did not prejudice the petitioner in any way, and that the trial judge did not err when he denied petitioner's petition for a writ of error coram nobis. Hopper v. Evans, supra; Beck v. Alabama, supra; Richardson v. State, Ala. Cr. App. 376 So. 2d 205; Ex Parte Richardson, Ala. 376 So. 2d 228; Beck v. Alabama, 444 US 897, 62 L Ed 2d 132, 100 S Ct 204; Summers v. State, supra.

The judgment of the trial court is due to be and is hereby affirmed.

The foregoing opinion was prepared by Honorable Joseph J. Mullins, a retired Circuit Judge, serving as a Judge of this Court; his opinion is hereby adopted as that of the Court.

The judgment below is hereby affirmed.

AFFIRMED.

All the Judges concur.

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October 1, 1982

Re: 81-937
Ex Parte: Herbert Lee Richardson
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Herbert Lee Richardson vs. State of Alabama)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

XXXXX Petition for Writ of Certicrari denied. No opinion. JONES, J. - TORBERT, C.J., MADDOX, FAULKNER, ALMON, SHORES, EMBRY, BEATTY AND ADAMS, JJ., CONCUR.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

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Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama

sepair. He fixed the date of full discovery as the day thereafter. He stated more than once that it was April but he did not know the date. There was no conflict in the evidence as to the time or date of discovery. There was no evidence from which the jury could fix that date as being subsequent to April 9, 1972, one year prior to filing of the suit. For the jury to have done so required a finding based upon pure speculation. To permit the jury to so speculate after defendant moved for a directed verdict was error and requires reversal. *Colonial Life & Accident Insurance Co. v. Collins*, 280 Ala. 373, 194 So.2d 532 (1967); *Williams v. Palmer*, 277 Ala. 188, 168 So.2d 220 (1964); *Davis v. Birmingham Electric Co.*, 250 Ala. 98, 33 So.2d 355 (1948). For failure of plaintiff to establish by the evidence that suit was commenced less than one year from the discovery of the alleged fraud, defendant was entitled to a directed verdict and the granting of his motion for judgment notwithstanding the verdict. The judgment below is reversed and remanded for entry of judgment notwithstanding the verdict.

The remainder of the stated issues are pretermitted.

REVERSED AND REMANDED WITH DIRECTION.

BRADLEY and HOLMES, JJ., concur.

Ex parte Charles E. BARBE.

(Re Robert L. FUQUA

v.

Charles E. BARBE).

79-1.

Supreme Court of Alabama.

Nov. 2, 1979.

Certiorari to the Court of Civil Appeals, 376 So.2d 202.

BLOODWORTH, Justice.

WRIT DENIED.

TORBERT, C. J., and FAULKNER, ALMON and EMBRY, JJ., concur.

App. #2

Herbert Lee RICHARDSON

v.

STATE.

4 Div. 624.

Court of Criminal Appeals of Alabama.

Oct. 3, 1978.

Opinion Following Remand Nov. 21, 1978.

Rehearing Denied Dec. 19, 1978.

Defendant was convicted before the Circuit Court, Houston County, Jerry M. White, J., of murder, and he appealed. The Court of Criminal Appeals, Harris, P. J., held that: (1) warrantless search of defendant's automobile, which was conducted on morning on which fatal explosion took place by military explosive ordnance detail upon request of police, was proper in view of mobility of automobile and knowledge obtained by police officer at explosion scene; (2) affidavit for warrant for search of defendant's house was not faulty on theory that it was "false" because police deputy swore that sergeant had informed him of all information in affidavit when, in fact, district attorney had relayed information for sergeant; (3) evidence, although entirely circumstantial, was sufficient to support inference that defendant placed bomb on front porch or steps of victim's home, and (4) where judge, at sentencing hearing at which death sentence was imposed, did not enter complete written findings as to ag-

gravating and mitigating circumstances, as required by statute, case would be remanded for entry of such findings.

Remanded to trial court; affirmed after trial courts' return after remandment.

Judgment affirmed, Ala., 376 So.2d 228.

1. Criminal Law ⇐438(6)

Gruesome, even ghastly and unsightly, photographs properly identified and authenticated are admissible if they tend to shed light on, strengthen or illustrate truth of other testimony; such photographs are admissible for purpose of shedding light on character and location of wounds on body of victim.

2. Arrest ⇐63.3, 63.5(1), 71.1(1)
Searches and Seizures ⇐3.3(1, 4), 7(27)

Six exceptions to requirement that warrant be obtained before search is executed are: plain view, consent, incident to lawful arrest, hot pursuit or emergency situations, exigent circumstances coupled with probable cause, and stop and frisk situations. U.S.C.A.Const. Amend. 4.

3. Searches and Seizures ⇐3.3(6)

Warrantless search, on morning on which fatal explosion took place, of automobile owned by defendant, who allegedly drove past explosion site a short time prior to explosion and who had allegedly threatened mother of girl killed in explosion because she would not allow defendant to see her daughter, conducted by military explosives ordnance detail upon request of police, was proper due to probable cause and exigent circumstances extant, and emergency situation presented, in light of mobility of automobile and knowledge obtained by police officer at scene of explosion. U.S.C.A.Const. Amend. 4.

4. Criminal Law ⇐394.4(5)

Evidence obtained in search conducted pursuant to warrant should be suppressed when either of the following occurs: intentional misstatement by affiant-agent, whether material or immaterial to showing probable cause; or negligent or unreasonable assertion in affidavit, if material to showing probable cause, but not where mistake is innocent, even if material to probable cause.

5. Searches and Seizures ⇐3.6(1)

Affidavit for warrant for search of defendant's house was not faulty on theory that it was "false" in that police deputy swore that police sergeant had informed him of all information in affidavit when in fact district attorney had relayed information for sergeant, where deputy talked to sergeant and district attorney in presence of judge who issued warrant, and where it was not apparent that deputy had intentionally or negligently misrepresented any facts underlying search warrant in question. U.S.C.A.Const. Amend. 4.

6. Searches and Seizures ⇐3.6(3)

Law enforcement officers participating in common investigation are reliable informants under *Aguilar* test. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐3.6(3)

Affidavit for warrant for search of defendant's house was not faulty on theory that it was "false" in that police deputy swore that police sergeant had informed him of all information in affidavit when in fact district attorney had relayed information for sergeant and that this constituted "hearsay piled on top of hearsay," and rendered affidavit faulty in absence of evidence other than hearsay to justify conclusion that hearsay was reliable. U.S.C.A.Const. Amend. 4.

8. Criminal Law ⇐552(4)

Circumstantial evidence is entitled to same weight as direct evidence, provided it points toward guilt of defendant.

9. Criminal Law ⇐741

Conflicting evidence is always question for jury to determine.

10. Homicide ⇐234(7)

In homicide prosecution brought against defendant charged with death of victim killed by bomb, evidence, although entirely circumstantial, was sufficient to support inference that defendant placed

bomb on front porch or steps of victim's home.

11. Homicide ⇐354

Unless and until trial judge, at sentencing hearing, reviews trial evidence to determine all aggravating circumstances leading up to and culminating in death of victim and then considers all mitigating circumstances in determining if any outweigh aggravating circumstances found in trial court's findings of fact, trial judge cannot fairly weigh aggravating and mitigating circumstances, and appellate court cannot adequately review his sentencing decision. Code of Ala.1975, § 13-11-4.

12. Homicide ⇐345

Where judge, at sentencing hearing at which death sentence was imposed, did not enter complete written findings as to aggravating and mitigating circumstances, as required by statute governing death sentence, case would be remanded for entry of such written findings. Code of Ala.1975, § 13-11-4.

After Remandment

13. Homicide ⇐250

Evidence in homicide prosecution brought against defendant charged with causing death of girl killed by explosion of bomb left on front porch or steps of girl's home supported written findings made by judge in imposing death sentence upon defendant. Code of Ala.1975, §§ 13-11-2 et seq., 13-11-3, 13-11-6, 13-11-7.

Daniel E. Robison, Dothan, for appellant.

William J. Baxley, Atty. Gen., and Samuel J. Clenney, III, Asst. Atty. Gen., for the State, appellee.

HARRIS, Presiding Judge.

Appellant was convicted of murder and the jury fixed his punishment at death. He was represented by court-appointed counsel and at arraignment pleaded not guilty. He and his attorney signed a written waiver for a special venire and agreed to strike a jury from the regular panel drawn for the week appellant's case was set for trial.

Appellant was tried on count one of the indictment which, omitting the formal parts, reads as follows:

"The Grand Jury of said County charge that, before the finding of this Indictment Herbert Lee Richardson, whose name is to the Grand Jury otherwise unknown, did unlawfully and with malice aforethought, willfully set off or explode dynamite or other explosives in, under, or dangerously near an inhabited dwelling house in which a human being was lodged, to-wit: Rena Mae Callins, and a person, Rena Mae Callins was intentionally killed by Herbert Lee Richardson because of said explosion, against the peace and dignity of the State of Alabama."

The State filed a motion to dismiss counts two and three of the indictment and this motion was granted.

Appellant filed a motion to suppress the evidence; a motion to quash the indictment; a motion to suppress certain photographs, and a motion to produce certain documents and other information. All of these motions were heard and denied by the trial court on January 20, 1978, with the exception of the motion to produce which was granted.

In connection with the motion to suppress the photographs appellant filed the following stipulation:

"Comes now the defendant in the above styled cause and does hereby stipulate that the said Rena Mae Callins was killed on the 16th day of August, 1977, as the proximate result of an explosive device and that said explosive device caused severe and fatal damage to the said Rena Mae Callins' body."

Accompanying the above stipulation was the following motion:

"Comes now the defendant, Herbert Lee Richardson, having heretofore stipulated that Rena Mae Callins was killed on the 16th day of August, 1977, as a proximate result of the explosion of an explosive device and that said explosive device caused severe and fatal damage to the

said Rena Mae Callins' body, and hereby moves to suppress the introduction of certain photographs in the possession of the Honorable Tom Sorrells, District Attorney of Houston County, Alabama, said photographs depicting the body of Rena Mae Callins after the explosion of said explosive device and as grounds therefor says as follows:

"1. The said photographs are irrelevant and immaterial to the issues in the trial of this cause.

"2. That the introduction of said photographs would inflame the minds of the jurors against the defendant.

"3. That the introduction of said photographs would be prejudicial to the defendant and deny him the right to a fair and impartial trial.

"4. That the introduction of said photographs in the light of the stipulation on file herein would only inflame the minds of the jury and be prejudicial to your defendant."

The photographs were taken at the scene of the explosion by Officer Larry Lynn of the Dothan Police Department. They depict the body of Rena Mae Callins from several different angles, revealing the massive and extensive damage caused by the explosive device. One photograph taken of the deceased's head from the direction of the blast was kept from the jury by the trial court. Three photographs of the victim were admitted into evidence, including one close-up of the victim's upper torso. Two other photographs show the victim's brain lying almost intact at her feet.

[1] It is settled law in this State that gruesome, even ghastly and unsightly, photographs properly identified and authenticated are admissible if they tend to shed light on, strengthen or illustrate the truth of other testimony. *Hurst v. State*, 54 Ala. App. 254, 307 So.2d 62; *Lewis v. State*, Ala.Cr.App., 339 So.2d 1035.

Such photographs are admissible for the purpose of shedding light on the character and location of the wounds on the body of the victim. *Cole v. State*, Ala.Cr.App., 337 So.2d 40; *Balentine v. State*, Ala.Cr.App., 339 So.2d 1053.

In *Lewis v. State*, supra, this Court held in an opinion by Judge Bookout:

"In Alabama, where the jury sets the punishment in homicide cases, we have been extremely liberal in allowing photographs portraying the mutilated bodies of victims. This for the purpose *inter alia* of shedding light upon the viciousness of the crime, the depravity of the killer, the ferocity of the attack, and like circumstances which the jury may take into consideration in fixing punishment. We have not allowed a depraved and vicious killer to mitigate his horrible or animalistic acts by merely stipulating that the victim is dead and the cause of death. . . ."

On January 11, 1978, appellant filed the following motion:

". . . Comes now the defendant in the above styled cause and moves to suppress as evidence to be used in the trial in the above styled cause on January 23, 1978, all items seized under the authority of certain searches of the defendant's vehicle and home, said searches having occurred on August 16, 1977, a copy of said search warrants and returns being attached hereto and marked Exhibit 'A' and 'B' respectively, and as grounds therefor the defendant says as follows:

1.

"Said search warrants were issued in violation of Title 15, Chapter 5, Section [Sections] 2 and 3 of the Code of Alabama, 1975.

2.

"Said search warrants were issued in violation of Section 5, Constitution of Alabama of 1901 and Amendment IV, Constitution of the United States.

3.

"For the said search warrants were issued without probable cause.

4.

"For the affidavit in support of said search warrants is legally insufficient to justify the issuance of the subject search warrants."

This motion was heard by the trial court on January 20, 1978. The evidence adduced at that time is fully set out below.

Jimmy Hand testified that he was employed by the Sheriff's Department in Geneva, Alabama. On August 16, 1977, Hand appeared before Judge Black, the Geneva County District Judge, for the purpose of obtaining a search warrant in the case at bar.

The following are the affidavits, filed by Hand, and the warrant, issued thereon:

"State of Alabama In the District Court
Geneva County of Geneva County, Alabama

"Before me, George A. Black, Judge of the District Court of Geneva County, Alabama, personally appeared Jimmy Hand, Deputy Sheriff. The undersigned being duly sworn deposes and says: That he has reason to believe and does believe, that on the premises known as Rosetta Richardson residence being located at 214 North 6th Ave., Hartford, Alabama in Geneva County, Alabama. A residence occupied by Rosetta Richardson whose name is otherwise unknown, there is now being concealed illegal explosives devices in the County of Geneva namely:

"Illegal Explosives to-wit: Explosive devices of any illegal nature contrary to law.

"I have received information from a reliable person, that a subject living or who has lived at the above described address has been involved in a felony where explosive devices have been used: to-wit: explosives devices have been used within the last 24 hours, and I have reason to believe that explosive device or explosive device paraphernalia is present at this residence at this time.

"I therefore request a search warrant to search these premises.

/s/ Jimmy Hand
Jimmy Hand, Deputy Sheriff

"Sworn to before me, and subscribed in my presence, the 16th day of August, 1977.

/s/ George A. Black
Judge, District Court

* * * * * *

"Affidavit

"Before me the undersigned authority, personally appeared Jimmy Hand Deputy Sheriff of Geneva County Sheriff Dept., who is known to me and after being first duly sworn, deposes and states under oath as follows:

"1. That Sgt. Harold Locke of the Dothan Police Department has information that Rena Mae Callins was killed on August 16, 1977 and that her death was result of a pipe bomb.

"2. Officer Locke stated that he was personally told by victim's mother Doris Weems, that Hubert Richardson had threatened her life.

"3. Sgt. Locke further stated that Randall Kallines (sic) told him he saw Hubert Richardson leave the scene of the crime at 129 East North Street at approximately 6 a. m. on August 16, 1977, immediately after leaving Randall Kallines (sic) said he saw bomb on front porch.

"4. Sgt. Locke, stated that he personally saw pipe that was identical pipe to that was used in the bomb, also pipe of this description was seen in the truck that Richardson used on his job.

"5. Sgt. Locke stated that he saw pipe like that what was used in the bomb in the back yard of Rosetta Richardson's residence in Hartford as described in search warrant.

"6. Houston County Police Officers informed Jimmy Hand that batteries and wire similar to that used in bombs was found in Hubert Richardson's car.

/s/ Jimmy Hand
Jimmy Hand

"Sworn to before me and subscribed in my presence August 16, 1977.

/s/ George A. Black
District Judge"

"State of Alabama
Geneva County

"TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY:

"Proof by affidavit having this day been made before me by Jimmy Hand that he had probable cause to believe that Rosetta Richardson whose name is otherwise unknown to affiant, has in possession explosive device or explosive paraphernalia as described above in the affidavit, at the premises of Rosetta Richardson being located 214 North 6th Ave., Hartford, Alabama in Geneva County, Alabama.

"You are therefore commanded, in the daytime only to make immediate search of the person of Rosetta Richardson and all other persons present and all automobiles and outhouses and in and upon the above described premises for the following explosive devices or explosive paraphernalia and if you find the same or any part thereof, to bring it forthwith before me, at my office at the Courthouse.

"Dated this the 16th day of August, 1977.

/s/ George A. Black
Judge, District Court"

On the afternoon of August 16, 1977, Hand testified, he and his partner were notified through radio dispatch from the Hartford Police Department to stand by for some "traffic." Shortly thereafter, Hand received a telephone call from Hartford. At this time he spoke briefly to Sergeant Locke of the Dothan Police Department and at length to Houston County District Attorney Tom Sorrells. Sorrells gave Hand the information contained in the affidavit, telling him that this information was gathered by Officer Locke. Locke was personally known to Hand.

In addition to the information contained in the affidavit for the warrant, Hand also, under oath, told Judge Black that he received this information from Sorrells who was relaying it from Officer Locke. Hand told Judge Black that the police officers knew that appellant lived with Rosetta Richardson at the residence listed in the affidavit. A tag issued to appellant's car was registered to that address.

After obtaining the warrant, Hand participated in a search of Rosetta Richardson's home. Also present were Officer Locke and two Alcohol, Tobacco and Firearms Agents, a unit of the United States Treasury Department. As items were confiscated by the officers, they were marked, stored in containers and given to Officer Locke. A list of items seized at the residence was typed up and attached to the warrant, which was then shown to Judge Black two days later. That list is set out below:

"Items Seized in Search of 614 6th Avenue, Hartford, Alabama

Residence of Herbert Lee Richardson.

One black and red electric wire.

One rubber glove with gunpowder residue.

Seven small pieces of green, white, orange wire.

Small pieces of electrical tape.

One sample of gunpowder found on dresser in master bedroom.

Two pieces of cardboard.

One pair of scissors.

One screwdriver.

One piece of cardboard (irregular cut).

Wirecutters with green handle with gunpowder residue.

Micro (mercury) switches.

One can (half-full) of Brand AA ball powder, one pound capacity.

One check stub, name of Herbert Lee Richardson.

One book entitled, '1977 Model Rocketry Catalog,' No. 771.

One book entitled, 'Explosives and Bomb Disposal Guide' 4th printing, stamped 'Library Copy' with a Houston Memorial Library Card, George S. Houston Memorial Library, Dothan, Date of which to be returned, August 19, 1977. Also stamped property of George S. Houston Memorial Library."

Randy Callins testified that on August 16, 1977 he lived at 129 East North Street in Dothan, Alabama, with his mother Marjorie Callins and his sister Rena Mae Callins. On that morning, after the explosion, he talked to the investigating officers. He told the officers that before the blast he

had seen a plastic bag on a chair on the front porch but he did not know what was in the plastic bag. He further testified that he saw appellant drive by the house between six and seven o'clock that morning before the bomb exploded. He gave the officers a description of the automobile driven by appellant. He stated that appellant stopped at a record shop near this address. Appellant got out of his car and looked back at the house for a while and then left.

Sergeant Harold Locke testified that he was assigned to the Criminal Investigation Division of the Dothan Police Department. On August 16, 1977, he went to the home of Rosetta Richardson in Hartford, Alabama, at approximately 4:30 p. m. He was accompanied by the District Attorney, Hartford Police Chief Smith, Sergeant Larry Lynn and two special agents with the Alcohol, Tobacco and Firearms Unit of the Treasury Department. These officers ascertained that no one was at home. They knocked on the front door but got no response. They looked around the outside premises. Locke stated that as they drove to the house he observed some galvanized pipe in the yard which was clearly visible from the street. He said this pipe was very similar to the pipe fragments he had examined at the scene of the blast at 129 East North Street that morning.

Prior to the search of Rosetta Richardson's home, appellant's car had been examined by an Explosives Ordnance Detail from Fort Rucker upon request of L. E. Stokes, Commander of the Criminal Investigation Division of the Dothan Police Department. Subsequent to this examination by military personnel, Stokes had obtained a search warrant and searched this vehicle.

L. E. Stokes testified that he investigated a bomb explosion on the morning of August 16, 1977, at approximately 8:30 a. m. The warrant to search appellant's car was supported by the following affidavit:

". . . . 1. Before me Billy J. Sheffield a Judge of the Houston County District Court, Houston County, Alabama, 2. personally appeared L. E. Stokes 3. who, being duly sworn, depoces and says that Herbert Lee Richardson, with malice aforethought and with premeditation, killed Rena Mae Callins and did this by exploding a bomb, and that batterics, wires, switches and other paraphernalia used in the making of a bomb are believed to be in the automobile, to-wit: a 1970 Pontiac Firebird, brown over brown in color, Alabama Tag #CMX-085, 1977, the property of Herbert Lee Richardson. Affiant's probable cause for believing the said facts are:

"(1) Witnesses observed the 1970 Pontiac automobile described above passing by the house where Rena Mae Callins was killed, to-wit: 129 East North Street, Dothan, Houston County, Alabama, a short time prior to the explosion.

"(2) The above described automobile was described by witnesses at the scene of the explosion as being known to them to be the property of Herbert Lee Richardson.

"(3) A search of the area around 129 East North Street where Rena Mae Callins was killed by a bomb at about 8:30 a. m. on August 16, 1977, revealed fragments of a battery or batteries.

"(4) Herbert Lee Richardson was known to have been in the automobile when it was seen at 129 East North Street and a description of him and the automobile was given out over the City of Dothan Police Department radio network and the car was located at the intersection of U. S. Highway 84 West and the Ross Clark Circle at Tom's Drive Inn Restaurant abandoned and locked up.

"(5) The car was found within a short period of time after the explosion and the City of Dothan Police who arrived at the scene called the bomb disposal squad of the U. S. Army at Ft. Rucker who opened the car and took out all of the items in the car while the car was parked at the above location.

"(6) At this time, affiant saw a 9 volt battery consistent with the pieces of battery found at the scene of the explosion. Wires, two small switches that could have been used in the making of a battery and

the size and shape of a 9 volt battery was consistent with the fragments found at the scene of a bombing. The car was found at 11 a. m. on August 16, 1977; examined by the bomb squad at 1 o'clock.

"(7) Randy Callins saw the above described car just prior to the explosion. Randy Callins shortly before the bomb went off saw the above described car and Herbert Lee Richardson driving the car leave the area of 129 East North Street. Witnesses told affiant that the package was not there before the car drove by.

"(8) The residence at 129 East North Street, Dothan, Alabama was the residence on August 16, 1977 of a daughter of Emma Wymes. Herbert Lee Richardson had in the early part of 1977 dated a daughter of Emma Wymes and Herbert Lee Richardson wrote a message and mailed it through the U.S. mail and Emma Wymes picked it up at the post office on August 15, 1977 and in this message, Herbert Lee Richardson said in substance that the daughter of Emma Wymes, that he had been dating, would have an unhappy birthday on August 16, 1977. August 16, 1977 is in fact the birthday of that daughter. Mrs. Remus Callins was in fact at the residence at 129 East North Street when the bomb exploded and she was in the house when he rode by the house before the bomb went off.

(1)

(2) "Herbert Lee Richardson had within the last past 6 weeks threatened to kill Mrs. Remus Callins and had threatened to kill Emma Wymes.

"(9) Affiant was told by witnesses at the scene of the explosion that Herbert Lee Richardson was mad at Rena Mae Callins' mother because she had been refusing to let Herbert Lee Richardson see her sister whom he had formerly dated.

"I am the Lt. in charge of the Criminal Investigation Division of the City of Dothan Police Department and I am in charge of the above described investigation.

"Sworn to and subscribed before me this the 16th day of August 1977

/s/ L. E. Stokes
/s/ Billy J. Sheffield
Judge, Houston County District Court, Houston County, Alabama."

Stokes testified that appellant's car was located at 11:00 a. m. parked at Tom's Restaurant. When the EOD team arrived, Stokes stated, the members of the team checked the car "from one end to the other, inside and out." Following the inspection, Stokes was informed by an officer of the detail that the car was safe to approach. Stokes and Tommy Mullis, another police officer, placed all the items removed by the EOD team back into the car; Mullis then driving the car back to the police station. Stokes admitted that the affidavit for the subsequent warrant was based in part on what he had observed during the course of the examination of the car by the EOD team.

When the warrant was obtained from Judge Sheffield, a search was carried out and numerous items were seized. The return is set out below:

"two 30-06 rounds (markings S S L)

1 partial roll of electrical tape

1 partial roll of Red Cross adhesive tape

1 heavy duty long Fox glo-plug

1 DD214 in name of Richardson, Herbert Lee

8 AG-1B flashbulbs by GE

1 Eveready 9 volt transistor battery

2 small wadded piece of electrical tape

1 small Craftaman screwdriver

1 pair of eyebrow tweezers (no nameb-rand)

1 pointed steel rod ⅜" in diameter approx. 2½ in. long

1 roll of masking tape (coated with gauze)

1 rubber spacer (S.N. 5149-68)

1 partial roll of electrical tape

1 strip of black electrical tape (approx. 4" long)

1 Murray Corp. hose clamp

3 blue rubber cylinder type insulators taped together with electrical tape

2 metal washers

(a) appx. ⅝" shock washer
(b) appx. ½" flat metal washer
1 strip of 3 strand electrical wire
assorted papers"

Stokes testified that he interviewed Randy Callins at the blast site. Randy told him that he had not seen the package on the porch before he saw appellant ride by the house. Several of the dead child's relatives were interviewed at the scene. Mrs. Remus Callins, the mother of the deceased, told Stokes that appellant had threatened her because she would not allow him to see her sister. While at the scene, Stokes found what appeared to be the base of a nine-volt battery.

On cross-examination, Stokes testified that Tom's Restaurant was a public place and that patrons were present at the time appellant's car was found. Based on the information Stokes gathered at the scene of the blast, and the belief that the public should be protected, Stokes determined that it was necessary to summon the EOD team from Fort Rucker. Stokes testified that, although he had not included it in the affidavit or told the issuing magistrate, Doris Wymes told him that appellant had talked to her about making bombs. Ms. Wymes had seen pipe in appellant's yard before. In addition, appellant had told Doris Wymes that he killed a woman in New Jersey and had to leave that state.

(1) [2, 3] Appellant first contends that the police were not justified in carrying out a warrantless search of his vehicle. As appellant correctly notes, there are six exceptions to the requirement that a warrant be obtained before a search is executed. They are: (1) plain view, (2) consent, (3) incident to a lawful arrest, (4) hot pursuit or emergency situations, (5) exigent circumstances coupled with probable cause, and (6) stop and frisk situations. *Baker v. State* Ala.Cr. App., 340 So.2d 854.

Appellant points out that the search was not incident to a lawful arrest, not plain view, that consent was not at issue, and that a stop and frisk was not involved. He further contends that no probable cause or exigent circumstances existed, and that no emergency situation was present. Here appellant is mistaken.

The facts in the case at bar are strikingly similar to those of *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706. There the respondent Dombrowski was arrested by police for drunken driving after being involved in a one car accident; he told the officers he was a Chicago police officer. On the next day, believing that a Chicago police officer must carry his service revolver at all times, a local police officer conducted a warrantless search of Dombrowski's car, since he had not found the revolver on Dombrowski's person. In the locked trunk of the car, the investigating officer found several items, some bloodied. Subsequently this evidence, coupled with other information obtained from Dombrowski, led police to a bloodstained body on Dombrowski's brother's farm. The United States Supreme Court held that the search of the vehicle's trunk was not unreasonable since it was necessary to keep the weapon from falling into improper hands, and protect the public.

Secondly, it should be noted that the mobility of the vehicle coupled with the knowledge obtained by Stokes at the blast scene warranted the course of action taken. The constitutional difference between the searches of houses and cars is well established. *Chambers v. Maroney*, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419.

(2) Next appellant attacks the sufficiency of the affidavit for the warrant for the search of appellant's house, claiming that it was "false." Appellant bases this contention on two factors.

First, appellant urges that Deputy Hand swore that Sergeant Locke had informed him of all the information in the affidavit; when, in fact, District Attorney Tom Sorrells had relayed the information for Locke. Then appellant states that this was "hearsay piled on top of hearsay." Though hearsay will support a search warrant, appellant writes in brief, the affiant must state evidence other than hearsay to justify a conclusion that the hearsay is reliable. *Clen-*

ney v. State, 281 Ala. 9, 198 So.2d 293. As other authority for his argument, appellant cites *Sopejak v. State*, 42 Ala.App. 606, 173 So.2d 403. There the affidavit stated that the affiant had personally appeared before the magistrate when in fact he had not; this Court reversed and remanded the case.

It appears in the record of the motion to suppress the evidence that Deputy Hand talked to Locke and Sorrells in the presence of the judge who issued the warrant. From the record:

"Q. And did you tell him you were talking to the Police Department, to the District Attorney?

"A. Yes, sir.

"Q. And he was telling you what Sergeant Locke was telling him?

"A. Yes, sir.

"Q. And did you swear to everything you told the Judge then after this conversation on the phone?

"A. Yes, sir."

[4, 5] In *United States v. Thomas*, 489 F.2d 664, the Fifth Circuit Court of Appeals adopted the standards to be used in evaluating affidavits which are alleged to contain misrepresentations. Evidence should be suppressed when either of the following occurs:

". . . (1) an intentional misstatement by an affiant-agent, whether material or immaterial to showing probable cause; or (2) a negligent or unreasonable assertion in an affidavit, if material to showing probable cause, but not where (3) the mistake is innocent, even if material to probable cause."

It is not apparent from the record that Deputy Hand has intentionally or negligently misrepresented any of the facts underlying the search warrant in question. See also, *Smith v. State*, Ala.Cr.App., 351 So.2d 668, cert. denied, Ala., 351 So.2d 675.

[6, 7] As to appellant's attack on the affidavit on the basis of *Clenney*, supra, that, too, must fail. At the initial point of analysis, it should be noted that law enforcement officers participating in a common investigation are reliable informants under *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723; *Brooks v. United States*, 416 F.2d 1044, Fifth Circuit Court of Appeals; *Davis v. State*, Ala.Cr.App., 333 So.2d 168. The question of the reliability of the information supplied by members of the victim's family to Locke remains.

In *United States v. Bell*, 457 F.2d 1231, the Fifth Circuit Court of Appeals addressed this issue. We find the following language.

". . . . It is now a well-settled and familiar concept, as enunciated by Aguilar and Spinelli, that supporting affidavits in an application for a search warrant must attest to the credibility of an informant and the reliability of his information. See also *United States v. Harris*, 403 U.S. 573, 91 S.Ct. 2075, 29 L.Ed.2d 723 (1971). We have discovered no case that extends this requirement to the identified bystander or victim-eyewitness to a crime, and we now hold that no such requirement need be met. The rationale behind requiring a showing of credibility and reliability is to prevent searches based upon an unknown informant's tip that may not reflect anything more than idle rumor or irresponsible conjecture. Thus, without the establishment of the probability of reliability, a 'neutral and detached magistrate' could not adequately assess the probative value of the tip in exercising his judgment as to the existence of probable cause. Many informants are intimately involved with the persons informed upon and with the illegal conduct at hand, and this circumstance could also affect their credibility. None of these considerations is present in the eyewitness situation such as was present here. Such observers are seldom involved with the miscreants or the crime. Eyewitnesses by definition are not passing along idle rumor, for they either have been the victims of the crime or have otherwise seen some portion of it. A 'neutral and detached magistrate' could adequately assess the probative value of an eyewitness's information because, if it is reasonable and accepted as true, the

magistrate must believe that it is based upon firsthand knowledge. Thus we conclude that Aguilar and Spinelli requirements are limited to the informant situation only."

Thus the affidavit for the warrant for the search of appellant's home was sufficient. See also *United States v. Romano*, 482 F.2d 1183 (5th Cir.); and *Alexander v. State*, Ala.Cr.App., 337 So.2d 99.

On the trial in chief John Bruner testified that on August 16, 1977 he was employed by the Dothan Police Department. On that morning, Bruner went to 129 East North Street, where he saw a body lying on the doorstep. Upon observing this, Bruner called his supervisor and began to "secure" the scene. The body was that of a female, portions of the head and face were "missing." While Bruner was on the scene, Sergeant Larry Lynn arrived. Neither of these two men disturbed the body; however, Bruner covered it with a bedspread, taken from a couch in the house.

Randy Callins testified that he was ten years old, the brother of Rena Mae Callins, and that he lived at 129 North East Street on August 16, 1977. On that morning, Randy got up early, before anyone else did, and "called the time" on the phone in Rena Mae's room, on the front of the house. Randy looked out the window and saw appellant's car, a brown and white Firebird, go by the house and stop at the record shop. After stopping there for a short while, appellant continued down the road in the same direction that he passed the house. Randy saw a plastic bag on the porch then. About a month prior to the date in question, appellant had called Randy a "Black son-of-a-bitch."

Larry Lynn testified that he was employed by the Dothan Police Department. On August 16, 1977, Lynn proceeded to 129 East North Street in Dothan, arriving at 9:15 a. m. Patrolman Bruner was on the scene. When Lynn arrived, he saw a body lying under a tan bedspread in front of a white frame house. Removing the bedspread, Lynn saw the body of Rena Mae Callins, lying on her left side; the left side of her face was missing, it appearing to have been blown away. The major part of the victim's brain was lying beside her right foot.

Lynn further testified that the scene was secured, closed off by ropes on each end of that block of houses. While on the scene, Lynn conducted a search for human tissue, locating two of the victim's fingers one hundred and twenty-eight feet east of the body, one finger ninety feet east of the body, and a number of pieces of flesh and bone matter in an area one hundred and twenty-eight feet east of the body to forty feet west of the body.

A search of the area by Lynn turned up numerous items; his inventory follows:

"Q. Would you tell us what you found on the street there?

"A. . . . . Found what appeared to be a spring from a clock at the intersection of East North Street and College Street and found one piece of a metal clamp found 7 feet, 10 inches north on the north edge of North College Street. Found one small nut on the south side of East North Street along with a small piece of round metal. One round metal cap on the north side of East North Street. One round metal washer 24 feet, 2 inches from North College Street. One round metal rod with screws on each end and a round metal disc in the center. One piece of black plastic material, appeared to be part of a battery.

"MR. HERRING: Object to what it appeared to be.

"THE COURT: Yes. Sustained. If you will, just tell us what you found.

"THE WITNESS: One piece of threaded pipe at the same location that we found the two small metal objects, one metal washer and one metal cap. Two small pieces of masking tape, white in color found in the yard at 133 East North Street. One piece of battery in the yard of 133 East North Street. One piece of a coat hanger 148 feet, 8 inches west of North College Street in the center of the roadway. Or approximately 24 feet from the center of the roadway in the yard of

129 East North Street. One piece of threaded pipe laying against the east wall of the house at, 20 feet from the east wall at 129 East North. One large piece of metal pipe 163 feet, 6 inches west of North College Street, approximately 3 feet north of the center line. One small piece of black electrician's tape laying against the south curb of East North Street 172 feet, 10 inches west of North College. One small piece of metal cap found on the southern curb of East North Street. One piece of treated metal pipe 181 feet, 10 inches west of North College Street on the south curb. One piece of threaded metal found on the sidewalk approximately 15 feet from the center of the roadway, 188 feet west of North College. It was directly in front of 130 East North Street. One piece of metal, piece of pipe approximately 2 inches in diameter. The projectile went through the front wall of 130 East North Street, penetrated a one inch board in the outside of the house and then through a one inch piece of plywood and paneling and penetrated the back of a chest of drawers and the back of the chest of drawers was approximately 1/2 inch deep. It was resting inside of some clothing inside a drawer. The projectile entered the front of the house 196 feet, 9 inches west of North College Street, approximately 29 feet south of the center of the roadway. One piece of white masking tape was found in the yard at 127 East North Street. One piece of metal pipe, 246 feet, 8 inches west of North College Street, approximately 19 feet north of the center line of the roadway. One 2 inch bolt, 250 feet, 3 inches west of North College Street, approximately 18 feet north of the center of the roadway. One metal bolt, 250 feet, 1 inch west of North College Street on the north edge of the roadway. One round piece of metal, 278 feet, 3 inches west of North College Street, 17 feet north of the center of the roadway. Another piece of round metal threaded pipe was lodged in the door of the victim's house at 129 East North Street. Picked up several pieces of metal and parts from the walls and the floor at the victim's home at 129 East North Street. We swept the front porch and the step area around the body where the victim was laying. A piece of electrical apparatus was found on the front porch of 133 East North. One battery was found in a wooden produce basket on the front of the house on 129 East North Street. Metal fragments from the metal threaded pipe from the rafters and the loft of 129 East North Street. A small piece of metal embedded in the floor of the porch behind the screened, hinged door at 129 East North Street. Also a piece of tape found along with the metal. One large thick metal washer, small metal cap, piece of circular yellow plastic by the curb on the north side of the street, approximately 124 feet west of North College on East North Street."

* * * * * *

"Q. Did you observe any powder of any kind there at the scene?

"A. Yes, sir.

"Q. Could you recognize what kind of powder that was?

"A. Yes, sir.

"Q. What kind of powder was it?

"Q. It was a smokeless powder of some type."

In gathering up these items, Lynn was aided by Dale Carter of the Enterprise Crime Laboratory. Carter bagged the evidence as Lynn picked it up and sealed the items, initialling each bag. Each of these small bags was placed in one large bag and turned over to Agent T. D. Dubose of A.T.F.

Valica Powell testified that she knew Rena Mae Callins and spent the night at her house the night before she died. She woke up at nine o'clock that morning; Rena Mae was already up. Valica and Rena Mae called a friend and, after talking to him, went out on the front porch. On the porch was what appeared to be a drink can in a plastic bag. Rena Mae picked it up and gave it to Valica, who gave it back, telling Rena Mae to throw it away. Rena Mae

drew back her arm to throw the bag away, when the thing exploded. At that time, Valica was standing next to Rena Mae and she ran into the house when the explosion occurred.

On cross-examination, Valica testified that Rena Mae was her first cousin. When the explosion occurred, Valica's face, arms, and clothes were sprayed with a white powder; she was also hit in the head by a piece of wire. Eddie and Salina, Valica's sisters, who had also spent the night, ran out on the porch right after the explosion.

Larry Lynn was then recalled to testify; he stated that articles recovered at the scene were placed in thirty-two small bags and then placed in one container. These items were in the same condition as when they were recovered from the scene. However, the trial court did not admit these items, concluding they had not yet been connected up.

Later that day, Lynn testified, he aided Deputy Jimmy Hand in executing a search warrant for appellant's home in Hartford, Alabama. There, in the living room, Lynn found half of a can of smokeless powder and a box labeled "micro mercury switches." In the bedroom, Lynn found a rubber glove with gunpowder on it, gunpowder spilled on the surface of a dresser and several pieces of electrical wire. Near the bed was a book entitled "Explosives and Bomb Disposal Guide." This book was checked out from the George S. Houston Memorial Library in Dothan by appellant and was stamped due to be returned on August 19, 1977. These articles were all in the same condition as when they had been found, Lynn testified.

On voir dire examination, Lynn stated that the smokeless powder could be purchased by people generally, and that it was commonly used for reloading pistol ammunition. Mercury switches are generally used in thermostats. However, Lynn had previously testified that no reloading equipment was present in the house; nor was there a central heating or cooling system.

At this time the book, "Explosives and Bomb Disposal Guide", was admitted into evidence over appellant's objection on the ground that it was irrelevant.

Lynn further testified that he lifted prints from the can of gunpowder and sent them to the Alabama Bureau of Investigation, asking that they be compared with appellant's fingerprints. In addition to all the other items that he found on the scene, Lynn testified that he also discovered a piece of cardboard from which a circular pattern had been cut.

Jack Still testified that he was the Coroner in Houston County, Alabama. On August 16, 1977, Still went to 129 East North Street in Houston County, where he examined the body of Rena Mae Callins. Still observed that the victim's left hand and the left portion of her skull had been blown away. Surrounding the victim's body, which was covered with powder stippling, were pieces of pipe and other debris. Still concluded that the victim was killed by "some type of bomb explosion." In Still's opinion the explosion occurred "very close" to the body.

On cross-examination Still explained that "stippling" is similar to powder burn. The powder "gets under the skin" and causes a red marking.

Richard Dale Carter testified that he was employed by the Enterprise Laboratory of the Alabama Department of Toxicology and Criminal Investigation. Carter had been employed there for seven years and had received extensive training at institutions of higher education. On August 16, 1977, Carter was sent to 129 East North Street where he saw Jack Still. On the scene Carter observed the body of Rena Mae Callins and noted that there were several areas of powder stippling on her body. Subsequently, that day, Carter was present at a post-mortem examination of the victim's body, conducted by Van Pruitt. Tape lifts of powder were taken from the child's left arm, left chest, right arm and right leg. Carter further testified that Dr. Pruitt removed the victim's clothes, turned them over to him, and that he turned the clothes, in the same condition as when they were

removed from the body, over to Lieutenant Stokes.

L. E. Stokes testified that he was a lieutenant with the Dothan Police Department and that he commanded the Department's Criminal Investigation Division. Stokes testified that he received a package, containing female clothing, and clear tapes on a 3 × 5 index card, from Dale Carter on August 17, 1977. Stokes placed these items in a locked evidence room, where they remained until Stokes turned them over to A.T.F. Agent Dubose.

T. D. Dubose testified that he was employed by the Federal Bureau of Alcohol, Tobacco, and Firearms as a special agent, working out of Montgomery, Alabama. On August 16, 1977, Dubose was requested to assist the Dothan Police Department in an investigation. When Dubose arrived in Dothan, he went to 129 East North Street, and later saw Sergeant Lynn at the Police Department. At that time Lynn turned over to Dubose a bag containing numerous items. Each of these items was checked by Dubose and sent to a laboratory in Atlanta, Georgia, for examination by a chemist, Walter Mitchell. These items were all sent back to Dubose by registered mail, a few of them having been altered by the chemical analysis. Dubose then transported the evidence to a Mr. Casey, employed by the Explosive Technology Branch of the Bureau, in Washington, D.C. Dubose again received these items through registered mail, examined them, and determined that they were in their original condition.

Dubose further testified that he participated in the search of appellant's vehicle on August 16, 1977, removing each item seized and packaged at that time. Taken from the driver's compartment of the car were: "... a package of flash bulbs, a roll of adhesive tape, a glo plug, Fox glo plug, a 9 volt Eveready battery with a cut on the front of it. A roll of black electrician's tape, a screwdriver and a pair of tweezers. And another one of those Fox glo plugs, all removed from the driver's compartment of the car."

From the trunk of the car, Dubose took a roll of black tape, three rubber spacers taped together, a metal washer, a metal cap, and another spacer surrounded by a cap. All of these items, sent to Atlanta, were returned in the same condition as when they were seized. Dubose also testified that he received the articles of clothing and powder lifts from Lt. Stokes. These were sent to Atlanta and returned in the same condition.

Sharon Granger testified that she lived next door to Rena Mae Callins before she was killed. On the morning of the fatal incident, Sharon was sitting on the front porch of her house when she heard something that "sounded kind of like a gun;" immediately thereafter she saw Rena Mae lying at the bottom of the steps of the porch next door.

David Seay testified that he was employed by Seco Electric on August 16, 1977, and that he knew appellant who also worked for the same company. Seay picked up appellant about 7:00 a. m., on August 16, 1977, at Tom's Restaurant in Dothan and drove to Abbeville to run "conduit," a galvanized pipe, on a jobsite there. The pipe they were installing had a 2½ inch diameter.

Approximately a week before the day in question, Seay testified, he, appellant, and Paul Spivey, a co-worker, had a conversation on the way to a job in Bainbridge, Georgia. Appellant asked if the two men knew how to make a bomb and told them that he had made one and set it off in a field in Hartford, Alabama. The day before Rena Mae Callins was killed, appellant had left work at lunch time for an alleged dental appointment.

Paul Spivey testified that he was employed by Seco Electric on August 16, 1977, as a journeyman electrician. Spivey recounted the same conversation as Seay did.

Doris Wymes testified that she lived at 1205 Kinsey Road and that she had known appellant approximately two years. Ms. Wymes had dated appellant and broke off the relationship about three months before the death of Rena Mae Callins, her niece.

Appellant and Ms. Wymes had lived together for a period of time during their relationship. Ms. Wymes further testified that she and appellant had some difficulties after they broke up. Appellant told Ms. Wymes, ". . . . I will get you and your family, too." When she asked appellant what he meant he replied that she would find out.

Usually Ms. Wymes and her mother visited at 129 East North Street on Mondays and Tuesdays to can peas for the freezer. Ms. Wymes' mother had those two days off from work.

On the day before Rena Mae was killed, Ms. Wymes testified, she received a postcard in the mail. After Ms. Wymes identified the handwriting on the card as that of appellant, the writing was admitted into evidence without objection. The message of the card is set out below:

"Too bad you don't enjoy life no more. What a waste. I had a great time I wish you an un happy birthday."

Ms. Wymes further testified that three or four months before Rena Mae was killed appellant told her that he could make a bomb if he wanted to do so. One week before the day in question, appellant drove by her mother's house while she, her mother, and some friends were present and threw something up into the yard. This was immediately followed by what sounded like a shotgun blast; Ms. Wymes did not know what it was. Then the next Tuesday, Rena Mae was killed.

Wayne Love testified that he was the director of the Houston Memorial Library in Dothan and that in that capacity he was custodian of the records. Love testified that library records indicated that a book entitled "Explosives and Bomb Disposal Guide" was checked out on a card issued to appellant.

Joseph Wise testified that he was a counter salesman for Mack Electric Supply Company. On August 10, 1977, Wise sold a micro mercury switch to a person who identified himself as appellant. A sales slip recording the transaction was admitted into evidence without objection.

Mike Jones testified that he was employed by the City of Abbeville Police Department. On August 16, 1977, he arrested appellant at Alabama Forestry Products. Later that day Sergeant Harold Locke came to that police department. Appellant was wearing the same clothes as when he was arrested.

Harold Locke testified that he was a sergeant for the Dothan Police Department, assigned to the Criminal Investigation Division. On August 16, 1977, Locke went to the Abbeville Police Station where he observed appellant and the clothes he was wearing. Locke transported appellant back to Dothan; at the police station Officer Lynn obtained some clothes from appellant. These were placed in a bag and locked in the evidence room.

Edward Leon Baxter testified that he was employed by the Houston County Sheriff's Office. Baxter testified that he fingerprinted appellant on August 16, 1977. That card which he made was admitted into evidence without objection.

Larry Lynn was then recalled to testify. Lynn stated that he sent a photograph of the fingerprint lifts taken from the gunpowder can at appellant's home to a fingerprint expert in Montgomery. Those photographs were admitted in evidence without objection. Lynn further testified that the clothes obtained from appellant were turned over to Agent T. D. Dubose. A neutron activation analysis swab test was conducted by Lynn on appellant to determine whether or not he had handled any explosives. The test swab was also turned over to Dubose.

Edward Burkett testified that he was employed by the Alabama Bureau of Investigation as a fingerprint classifier. Burkett then listed his duties and qualifications for his job. Burkett compared the latent print lift to the ink print made by Baxter and stated that in his opinion the prints lifted from the gunpowder can were those of appellant.

T. D. Dubose was then recalled; he testified that the clothes of appellant that he received from Officer Lynn were taken to

the laboratory in Atlanta by him to Walter Mitchell.

Charles Henderson testified that he had known appellant approximately a year and a half. The night before Rena Mae Callins was killed, Henderson went to appellant's house to ask about some stereo speakers. Appellant asked Henderson if he could borrow a rifle and told Henderson that "he didn't care," when Henderson could not give him the weapon because some people in Dothan didn't like him. Appellant then told him that before Henderson had come over to the house he had been making a bomb.

Walter Mitchell testified that he was employed by the Bureau of Alcohol, Tobacco, and Firearms as a chemist in the Bureau's Laboratory in Atlanta. Mitchell identified a blue shirt, boots and a pair of blue pants as articles of clothing given to him by Agent Dubose. Also identified by Mitchell were the thirty-two small bags of fragments which in his opinion, were part of a bomb. This opinion was based upon the way the fragments had been "stressed" ripped; and the condition of the wire coverings, the battery parts, and tape. Mitchell further testified that he did not know how the material gathered at the scene could have been torn apart as they were by any other means than an explosion. At this time all the particles and fragments were admitted into evidence over the appellant's objection that their relevancy had not been shown. The trial court asked the witness, "You mean everything that is in this pile here was part of some bomb or explosive device?" The witness then reiterated that they were "under the stress of an explosion."

Mitchell further testified that wires recovered at appellant's house and wire recovered at the scene of the blast each had thirty-three copper wire strands which were the same size, .001 inches. These different sets of wires were subjected to microscopic examination and chemical analysis, the result being that they were the same type out of thousands of possible combinations of wire type and coating. These wires were admitted into evidence without objection.

Included in the debris recovered at the scene, Mitchell testified, were parts of a battery large enough to allow him to determine that they came from a no. 216NEDA1604 9 volt Eveready battery, which was stamped on one of the fragments. In evidence received from appellant's car, Mitchell testified, there was an Eveready 9 volt no. 216NEDA1604 battery. A piece of light blue plastic recovered at the scene matched the plastic of flashbulbs recovered from appellant's car. Tape taken from appellant's home and car was of the same chemical analysis as tape recovered from the bomb scene. Powder samples taken from the victim's clothing and defendant's clothing had the same physical and chemical characteristics, as did powder from the appellant's residence and samples from the bomb scene. Mitchell also found in a mercury switch box from appellant's residence a lead wire from a mercury switch, which he determined was sold nowhere in the southeastern United States except Dothan, Alabama. The rubber glove recovered at appellant's home was subjected to analysis and determined by Mitchell to have gunpowder on it of the same type he had previously testified to.

Lawrence Eugene Casey testified that he was employed in Washington, D.C., by the Bureau of Alcohol, Tobacco, and Firearms United States Treasury Department. Casey worked as an Explosive Enforcement Specialist, assisting state and local officials in investigations of violations of bombing and explosives laws. Having commanded a bomb disposal unit in the United States Army, Casey was also a bomb technician for the Oklahoma Bureau of Investigation for four years, a consultant to the International Association of Chiefs of Police, and an Explosive Disposal Officer in the United States Army Reserve. Casey also wrote training material on bomb investigation and disposal.

Casey further testified that he examined the debris recovered from the scene and determined from what type of device they had come and how such a device functioned.

Based on the evidence before him, Casey formed the opinion that the device was an explosive pipe bomb, functioning by "antidisturbance or antimovement." This, Casey testified, means that the device would normally explode when moved.

Based upon a hypothetical question positing a rotation of the device 90 degrees by the victim, Casey explained the operation of the bomb as follows:

"A. The movement of a package in two different planes of movement in a 90 degree movement of the package would indicate that the device functioned by an antidisturbance or antimovement fusing system.

"Q. All right. What is an antimovement fusing system?

"A. There are many components that can be used to construct the fusing system that is activated by movement. But one of the primary examples of the fusing system of this manner is using what is commonly called a mercury switch. A mercury switch simply allows electricity to flow through the electrical circuit when movement is applied to that component or through that mercury switch.

"Q. All right. Now, is there any kind of, in order for there to be any kind of safety factor in building one of these bombs, is there anything needed to keep that mercury switch stationary?

"A. The bomber would have a choice of either two methods of making the device safe until he was ready to utilize it. And one would be the making of his final connection or completing of the circuit at the location that he is going to plant the device. The obvious hazard to that selection is if he has constructed his device incorrectly or placed it in an incorrect position when he makes his final connection. The device could function with him present at the scene and inflict damage on him. The solution to that problem is by using some type of remote arming switch or mechanism which timing devices are commonly employed or used to close that circuit for him and give him enough time to get away from the bombing scene.

"Q. Is there anything that is used to keep the mercury switch itself stable?

"A. The mercury switch needs to be placed in a known orientation or position so that the bomber knows when he sets the package down and it becomes armed that the item will not automatically detonate or explode until such time as the victim or the person for which the bomb is intended actually picks the bomb up, allowing him to position that mercury switch at the bombing location of position. The bomber could use a number of materials to cause that positioning to be known. He could use tape or pieces of wood or cardboard or any hard material that would allow him to preposition that switch in a known position.

"Q. How would he utilize cardboard in doing that?

"A. He could utilize a piece of cardboard, cut or positioned to allow him to insert the mercury switch in a hole in the cardboard or in similar functions that uses the material or cardboard to brace that switch in the known position."

Having sifted through the debris recovered at the scene, Casey reconstructed a device using such a fuse system. In particular he noted the presence of the cardboard fragments, flashbulb fragments, and portions of a mercury switch. Casey observed that such a device is antipersonnel rather than antiproperty in nature.

"Q. All right. What, what are the usual consequences on a bomb of this nature, a booby trap bomb on any victim?

"A. The insidious nature of a booby trapped circuit or booby trap bomb is the fact that it is detonated or exploded by the victim which is unsuspecting of its action. It requires the movement of the package, usually caused by the victim. This insures that the victim to be will be in close proximity to the explosion when it occurs."

Casey also testified that he was familiar with "Explosives and Bomb Disposal Guide," describing it as a widely used textbook in bomb investigation and disposal

techniques. This book discussed fully each of the factors requisite to the construction of such an explosive device.

At this time the State rested and appellant made the following motion.

"MR. HERRING: Judge, at this time the Defendant would move to exclude the State's evidence on the grounds that they have failed to prove a prima facie case.

"THE COURT: Okay. Do you want to offer any argument?

"MR. HERRING: Judge, I would like to point out to the Court that there has been no testimony to show that this Defendant intentionally placed any sort of explosive device at the site of the crime. There is nothing to connect him with the intentional act that is complained of in the indictment. We feel that the State has failed to make out a case on that basis and the fact that the intentionalness of the act has not been shown, nor has it been shown that the Defendant actually committed the act complained of."

This motion was denied.

Appellant then called Lou Paul, who testified that she had known appellant and his wife Rosetta a "good while." Ms. Paul saw appellant standing by his car on the morning that Rena Mae Callins was killed; however, she just noticed that the hood was up in the car, and she didn't remember anything else.

William Crawford testified that he had known appellant over a year. On the morning Rena Mae Callins was killed, Crawford saw appellant at about 6 o'clock. Appellant and Crawford talked for a few minutes.

Marjorie Callins testified that she was the mother of Rena Mae Callins and that she had known appellant since he had been dating her sister Doris Wymes. Appellant had never threatened her, Mrs. Callins testified; however, he had called her son Randy a "Black son-of-a-bitch" about a month before Rena Mae was killed. On Sunday night, the night before Rena Mae died, Mrs. Callins did see appellant drive by the house. Doris Wymes and her mother were at the house at the time, and their car was parked out in front of the house.

Horace Fred Chamblis testified that he had checked the mileage from appellant's home in Hartford, Alabama, to 129 East North Street in Dothan, Alabama. By the shortest route that Chamblis discovered, the trip took forty-eight minutes at the posted speed limit.

Appellant testified that he had not made the bomb that killed Rena Mae Callins. Although he admitted that he had bought smokeless powder, a mercury switch and made round cardboard cutouts, these things were all used in repairs on his automobile. In particular, the gunpowder was used to help firm lead to build a battery terminal in his car. Appellant denied having purchased the powder at Dothan Shooter Supply, and saying that the powder was to be used to feed his dog and make it mean.

In rebuttal, Danny Hornsby testified that he sold appellant a pound of smokeless powder at Dothan Shooter about a month and a half before Rena Mae Callins was killed. Appellant told him that he was going to feed the powder to his dog to make it mean.

Charles Henderson testified that he visited appellant in jail in December. Appellant asked Henderson if he could have been mistaken about a bomb being mentioned during the conversation they had the night before Rena Mae Callins was killed. Henderson testified that he was not mistaken.

Larry Casey testified that in his opinion a battery terminal could not have been formed by the process described by appellant. However, this was excluded by the trial court on appellant's motion following voir dire examination revealing that Casey had not attempted such a process before.

This concluded the testimony in this case.

(3)

[8-10] As can be seen from the recital of the facts, the amount of evidence presented was voluminous, entirely circumstantial, and in total conflict, appellant denying any involvement in the death of Rena Mae Callins. However, circumstantial evidence is entitled to the same weight as direct evidence, provided it points toward the guilt of the accused. *Woods v. State*,

Ala.Cr.App., 344 So.2d 1225. Conflicting evidence is always a question for the jury to determine. *Lee v. State*, Ala.Cr.App., 346 So.2d 31.

Here the evidence presented by the State was more than enough from which the jury could infer that appellant placed an explosive device on the front porch or steps of the victim's home. His intention to kill the victim is evident from the fact that the device had to be triggered by the victim herself.

(3.) Appellant contends that Act 213, 1975 Ala.Acts, page 701 *et seq.*, now Sections 13-11-2, *et seq.*, Alabama Code 1975, is unconstitutional. The constitutionality of this law is no longer an open question in this State. On May 19, 1978, the Supreme Court of Alabama, in *Ex parte Jerry Wayne Jacobs*, Ala., 361 So.2d 640 (*In re Jerry Wayne Jacobs v. State of Alabama*) affirmed this Court's opinion in upholding the conviction of murder, including the sentence of death, and holding the Act constitutional. On August 11, 1978, the Alabama Supreme Court in denying Jacobs' application for rehearing took note of the cases of *Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 and *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 and concluded that those cases do not invalidate Alabama's sentencing scheme in death cases.

At the sentencing hearing in this case appellant's counsel made known to the Court that the defendant did not wish to present any testimony tending to show mitigating circumstances but insisted the defendant still maintains his innocence. Both sides presented legal arguments and rested.

From the record:

"THE COURT: All right. The Court hereby finds that under Section 13-11-6 of the Code of Alabama of 1975 and from the evidence that was presented in this case, that the following aggravating circumstances exist. I find that you knowingly created great risk of death to many persons. And I further find that the felony which was committed by you was an especially heinous, atrocious and cruel act. And based upon that, I hereby order that on May 25, 1978, that the Warden of William C. Holman Unit of the Alabama Prison System, within the walls of the said William C. Holman Unit of the Alabama Prison System, shall cause to pass through your body a current of electricity of sufficient intensity to cause death. And that application and intensity of such current through your body shall continue until you are dead.

"All right. He is in your custody."

Section 13-11-4, Ala.Code 1975 provides, in pertinent part, as follows:

"If the Court imposes a sentence of death, it shall set forth in writing, as the basis for the sentence of death, findings of fact from the trial and the sentence hearing, which shall at least include the following:

"(1) One or more of the aggravating circumstances enumerated in section 13-11-6, which it finds exists in the case and which it finds sufficient to support the sentence of death; and

"(2) Any of the mitigating circumstances enumerated in section 13-11-7 which it finds insufficient to outweigh the aggravating circumstances."

Chief Justice Torbert in his concurring opinion in the *Jacobs* case, supra, said:

"The Court of Criminal Appeals and this Court, by statute (Section 12-22-150, Code of Alabama 1975) and by Court rule (amended Rule 39(c), Ala.R.App.P.) respectively, must review the decision of the trial court where the death penalty is imposed. This mandatory review guarantees that, before a defendant can be executed in Alabama, the sentence of death must be found appropriate by both the Court of Criminal Appeals and this court after a review of the aggravating and mitigating circumstances found in the case by the trial judge.

"However, this appellate review safeguard—a substantial protection for the defendant in Alabama—is nonexistent unless the trial judge conducts a full and fair sentencing hearing *and enters com-*

plete written findings as to aggravating and mitigating circumstances. * * *" (Emphasis supplied)

The trial court set a sentencing hearing but he did not enter "complete written findings as to aggravating and mitigating circumstances."

[11, 12] The sentencing hearing is one of the most important and critical stages under Alabama's death penalty law. The guilt stage has passed. Now an experienced trial judge must consider the particularized circumstances surrounding the offense and the offender and determine if the accused is to die or be sentenced to life imprisonment without parole. It is a due process hearing of the highest magnitude and the exclusionary rules of evidence play no part. The trial evidence must be reviewed to determine all of the aggravating circumstances leading up to and culminating in the death of the victim and then all the mitigating circumstances must be considered in determining if any outweigh the aggravating circumstances so found in the trial court's findings of fact. Unless and until this is done "the trial judge cannot fairly weigh the aggravating and mitigating circumstances, and the appellate court cannot adequately review his sentencing decision."

Prior to the date set for the hearing the trial court shall order a pre-sentence report and furnish the defendant and his attorney with a copy of same. The defendant must be afforded the opportunity to adduce any testimony which has any probative value that will enable the court to perform its constitutional responsibility for the question of whether a man should live or die is not to be treated as a mere formality.

In *Jacobs*, supra, the Chief Justice wrote: "The sentencing hearing must not be a constitutional facade; though the burden of establishing mitigating circumstances must realistically rest with the defendant (citing cases), this does not relieve the trial court from the requirement of due process in the sentencing hearing. *Gardner v. Florida*, 430 U.S. 349 (1977); *State v. Lee*, 114 Ariz. 101, 559 P.2d 657 (1976).

In Nebraska the trial court in capital cases must order a presentence investigation and must set out a general order of procedure prior to the commencement of the sentencing hearing. (Citing another Nebraska case). In other words, the sentencing hearing must involve a serious attempt to examine the aggravating and mitigating factors surrounding the offense and the offender. The defendant cannot waive this right to due process through the failure of his attorney to make an objection. *Gardner v. Florida*, supra."

Accordingly, this case is remanded to the Circuit Court of Houston County to make and enter a full and complete written finding as to the aggravating and mitigating circumstances including "findings of fact from the trial and the sentence hearing," with the defendant and his trial counsel present.

The trial court is further directed that a full record be made of this hearing, which should be conducted expeditiously, and a transcript of these proceedings under the Seal of the Clerk be promptly forwarded to this Court.

Remanded for further proceedings in accordance with this opinion.

All the Judges concur.

After Remandment

[13] This case was remanded to the trial court to hold another sentencing hearing and to enter "complete written findings as to the aggravating and mitigating circumstances," based upon the evidence at trial. The Court was further directed to secure a presentence report and furnish the defendant and his attorney with a copy of same and to afford the defendant the opportunity to adduce any testimony that he may wish to present.

At the first sentencing hearing appellant's counsel made known to the court that the defendant did not wish to present any testimony tending to show any mitigating circumstances.

At the rescheduled hearing set for October 27, 1978, a presentence report was furnished to the defendant and his counsel. Appellant called Reverend J. C. McCleod as a witness in his behalf. Appellant also testified and filed a written statement in which he denied his guilt. Both sides made lengthy legal arguments on the law and the evidence.

Reverend McCleod testified that he had known the appellant for about three years and sometimes he attended church with his family. He found appellant to be a very intelligent man and that he had a reputation for being peaceful and minding his own business. His only contact with appellant was related to church affairs and he was a "very active man, a very knowledgeable, very sensible and quiet man during our meetings."

On cross-examination he stated that he did not know of any problems appellant had in Dothan, Alabama, New York or North Carolina. He further testified that there was some defective electrical wiring in the church and appellant repaired the wiring without making a charge for his work.

Appellant was sworn as a witness and the following occurred:

From the record:

"THE WITNESS: I will have to read this. (Witness reading from some papers.) I was tried under a statute which is punishable by death when a person has intent to kill by an explosion. I emphasize the killing. I understand this to mean that the victim was the intended victim of the explosion by the Defendant. Okay. The statute does not say when a person is killed by the Defendant, but it plainly states intentionally killed. I also realize that intent can be or may be inferred by the use of a deadly weapon. But the statute I was tried under has two elements. One being willfully setting off an explosion near a human inhabitant and secondly, intent to kill the person. Each element has its own principle and its own foundation. Therefore, intentionality demands its own proof in evidence. Not an inference from the nature or character of the weapon used. If intentionality can be inferred, then the purpose of the statute is defeated and it is reduced to a single act instead of two acts that this statute sets out and requires. It has been said that the mere fact that the device had to be triggered by the victim is evidence of intent to kill the victim. Well here again, the character of the weapon is being used to infer intent. It is a twofold statute stands defeated, reduced to a single act. The Code Title also states that the offense charged shall not include any lesser offenses. This too I think, must fail, because of the evidence presented by the State does include a lesser offense. Okay. The State's own evidence reduces any presumption of Rena Mae Callin being killed intentionally. There is no evidence of prior difficulty between the Defendant, myself, and the victim. The victim's own mother testified to this in evidence for the Record. It shows no malice or threat to the mother or the victim in this case by the Defendant. That intends to prove Rena Mae Callins was killed intentionally. The State's Case in chief and theme and theory shows that the victim was killed as a result of an explosion meant for someone else. Okay. The State's Evidence pointed to Doris Williams and Emma Williams as being the actual intended victim. The State went to great lengths to show prior difficulty between the Defendant and Doris Williams, along with her mother, Mrs. Emma Williams. The State put on testimony tending to show that the Defendant knew Doris Williams and Emma Williams would be at the site of the explosion, I mean, testimony tends to show this. At no time in any form is it evidence that Rena Mae Callins was the intended victim as to show that she was intentionally killed by the Defendant, because of the explosion. Okay. The inference drawn from the mechanics of the device is that it had to be triggered by the victim does not mean that the one that triggered it was the intended victim. Even if one was to consider this a fact

and not a conclusion, it is still heavily outweighed by the evidence presented by the State against any presumption that Rena Mae Callins was killed intentionally by the Defendant. I offer this statement in my own behalf of mitigating circumstances against the imposition of the death penalty. And in no way is this statement to be looked upon as an admission of guilt, because wholeheartedly I maintain my innocence. I would like to go further and comment on the trial itself. I would like to mention the reason I feel that the death penalty should not be imposed on me for one reason is the Prosecutor I think, severely damaged my character and severely damaged my own defense by mentioning false accusations where he admitted, he said in front of the Jury like I served two years which was actually false, to incriminate me. And then he said I killed a woman in New Jersey, which was incriminating. And that I made bombs in Vietnam, which he knew, he had a paper in his hand and knew that this was not true. So, I don't feel that you can give a man a death sentence when you have people telling outright lies. So, I feel that this Court did not cure the accusations in the mind of the Jury. Also, I believe that the post card sent to Doris Williams should not have been admissible in the sense that she herself was saying her birthday was on the 16th when in actuality it was not. It was on the 15th, August 15th. This is the Prosecutor made the card look like it was such an incriminating thing, a threat. And actually, she took the stand herself and said her birthday was on the 16th and in reality it was on the 15th. This is the reason I think it shouldn't be imposed, because actually, it was no fair trial. And I think this is a guarantee of any man, the least you can give him is a fair trial before you impose anything as severe as the death penalty. That is it."

The presentence report reveals that appellant had previous convictions in North Carolina for assault on a female and was sentenced to 30 days on the County Roads and placed on probation for two years in 1967. He was convicted of assault on a female in 1969 and was sentenced to 30 days on the County Farm. He was also sentenced to 30 days on the County Farm for damage to personal property in Wilmington. He was convicted for Breach of the Peace in the District Court of Houston County, Alabama, and sentenced to 12 months. He appealed this conviction and the appeal was pending when he was arrested for the crime of murder for which he now stands convicted.

The trial court made the following written findings in support of the imposition of the death sentence:

"*ORDER ON HEARING AS TO IMPOSITION OF DEATH SENTENCE*

"The Court, having conducted a rehearing pursuant to Section 13-11-3, *Code of Alabama 1975*, in accordance with order of the Court of Criminal Appeals of Alabama, of October 3, 1978, to determine whether or not the Court will sentence Herbert Lee Richardson to death or to life imprisonment without parole; and the Court having considered the evidence presented at the trial, the evidence at the sentence hearing and a presentence hearing prepared by the Probation Officer of Houston County, Alabama; the Court makes the following findings of fact:

"The Court first considers the aggravating circumstances as described in Section 13-11-6, *Code of Alabama 1975*:

"(a) The Court finds that the capital felony was not committed by Herbert Lee Richardson while he was under sentence of imprisonment.

"(b) The Court finds no evidence that Herbert Lee Richardson was previously convicted of another capital felony or any felony involving the use or threat of violence to any person.

"(c) The Court finds that the Defendant, Herbert Lee Richardson, knowingly created a great risk of death to many persons by the commission of the present capital felony. The testimony on the trial of this case convinced the Court that Herbert Lee Richardson placed a bomb on the front porch of an inhabited dwelling

in a heavily populated residential area of Dothan, Alabama; that at the time and on the occasion that Herbert Lee Richardson placed the subject bomb on the front porch of the dwelling house, said house was inhabited by several minor children and adults.

"(d) The Court finds no evidence that the capital felony was committed while the Defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping for ransom.

"(e) The Court finds that the capital felony was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

"(f) The Court finds that the capital felony was not committed for pecuniary gain.

"(g) The Court finds that the capital felony was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

"(h) The Court finds that the capital felony was especially heinous, atrocious and cruel. The Court finds from the evidence that the Defendant, Herbert Lee Richardson, made or assembled a bomb that is known as an antidisturbance or antimovement bomb; that such bombs are created for the purpose of killing people as opposed to destroying property; that the Defendant placed this bomb on the front porch of a house which was inhabited by several minor children and adults in a heavily populated residential area of the City of Dothan; that the victim, Rena Mae Callins, was a ten year old child; that when the victim attempted to throw or dispose of the bomb, it exploded and blew parts of her body over a two-block area.

"The Court now considers mitigating circumstances as described in Section 13-11-7, *Code of Alabama 1975*,:

"(a) The Court finds that Herbert Lee Richardson has a significant history of prior criminal activity having been previously convicted on two occasions of assault on a female in the State of North Carolina.

"(b) The Court finds that capital felony was not committed while Herbert Lee Richardson was under the influence of extreme mental or emotional disturbance.

"(c) The Court finds that the victim, Rena Mae Callins, was not a participant in the Defendant's conduct nor did the victim consent to his act.

"(d) The Court finds that Herbert Lee Richardson was not an accomplice in the capital felony committed, but was, in fact, the principal who created the bomb and placed it so that the victim came into possession of it thereby causing her death.

"(e) The Court finds that Herbert Lee Richardson did not act under extreme duress or under the substantial domination of another person.

"(f) The Court finds that the capacity of Herbert Lee Richardson to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was not substantially impaired and was not, in fact, impaired in any degree.

"(g) The Court finds that Herbert Lee Richardson's age at the time of the crime is not a mitigating circumstance.

"The Court having considered the aggravating circumstances and the mitigating circumstances and after weighing the aggravating and mitigating circumstances; it is the judgment of the Court that the death penalty as fixed by the jury should be and is hereby accepted.

"IT IS THEREFORE ORDERED, ADJUDGED AND DECREED BY THE COURT that Herbert Lee Richardson, is guilty of the capital felony charged in the Indictment specifically of willfully setting off or exploding dynamite or other explosive in, under or dangerously near an inhabited dwelling house and intentionally killing a person because of the explosion.

"THE COURT THEREFORE ORDERS AND ADJUDGES THAT YOU, Herbert Lee Richardson, suffer death by electrocution at any time before the hour of

sunrise on the 3rd day of February, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution.

"IT IS THEREFORE FURTHER ORDERED, ADJUDGED AND DECREED BY THE COURT, that the Warden of William C. Holman Unit of the Prison System at Atmore, Alabama, or in case of his death, disability or absence, his deputy, or in the event of the death, disability or absence of both the Warden and his deputy, the person appointed by the Commissioner of Corrections, at any time before the hour of sunrise, shall on the 3rd day of February, 1979, inside the walls of the William C. Holman Unit of the Prison System at Atmore, Alabama, in a room arranged for the purpose of electrocuting convicts sentenced to death by electrocution, cause to pass through the body of the said Herbert Lee Richardson, a current of electricity of sufficient intensity to cause his death, and the continuance of the application of such current through the body of Herbert Lee Richardson until the said Herbert Lee Richardson, be dead. MAY GOD HAVE MERCY ON YOUR SOUL.

"DONE AND ORDERED this 27th day of October, 1978.

/s/ Jerry M. White
JUDGE, TWENTIETH JUDICIAL CIRCUIT OF ALABAMA

"Filed in office this 27 day of October, 1978.

/s/ Julia L. Traut
Clerk

"Recorded in Minute Book No. 32; Page 161"

We are in full accord with the findings of the trial court and find that they are fully supported by the evidence in this case. Only a cunning and diabolical mind could have constructed such an insidious and death dealing device. This murder of a helpless, defenseless and innocent child is one of the most cruel, atrocious and heinous crimes in the annals of human depravity. Such a crime is deserving of no sentence but death.

The judgment of conviction and the sentence of death is affirmed.

AFFIRMED.

All the Judges concur.

App. #3.

Ex parte Herbert Lee RICHARDSON.

(In re Herbert Lee Richardson

v.

State of Alabama).

78-183.

Supreme Court of Alabama.

Sept. 28, 1979.

Rehearing Denied Nov. 6, 1979.

Defendant was convicted before the Circuit Court, Houston County, Jerry M. White, J., of murder, and he appealed. The Court of Criminal Appeals, Harris, P. J., 376 So.2d 205, affirmed, and certiorari was granted. The Supreme Court held that: (1) warrantless search of defendant's automobile was justified where police officer had determined that defendant had driven past explosion site a short time prior to explosion, and had allegedly threatened mother of girl killed in explosion because she would not allow defendant to see her daughter, and where witness had told officer that defendant had talked to her about making bombs and that witness had seen pipe in defendant's yard; mobility of vehicle coupled with knowledge obtained by officer warranted the warrantless search; (2) affidavit for search warrant was not rendered faulty merely because police deputy swore that police sergeant had informed him of all information in affidavit when in

fact district attorney had relayed the information for sergeant, since deputy talked to sergeant and district attorney in presence of judge who issued warrant, and it was not apparent that deputy had intentionally or negligently misrepresented any facts; and (3) evidence sustained conviction.

Affirmed.

Faulkner, Embry and Beatty, JJ., dissented.

1. Searches and Seizures ⇐3.3(6)

Warrantless search of defendant's automobile was justified where police officer had determined that defendant had driven past explosion site a short time prior to explosion, and had allegedly threatened mother of girl killed in explosion because she would not allow defendant to see her daughter, and where witness had told officer that defendant had talked to her about making bombs and that witness had seen pipe in defendant's yard; mobility of vehicle coupled with knowledge obtained by officer warranted the warrantless search.

2. Searches and Seizures ⇐3.6(3)

Affidavit for search warrant was not rendered faulty merely because police deputy swore that police sergeant had informed him of all information in affidavit when in fact district attorney had relayed the information for sergeant, since deputy talked to sergeant and district attorney in presence of judge who issued warrant, and it was not apparent that deputy had intentionally or negligently misrepresented any facts.

3. Homicide ⇐234(1)

Evidence in prosecution for intentionally killing a person by wilfully causing an explosion near a dwelling house sustained conviction.

Daniel E. Robison, Dothan, for appellant; Herbert Lee Richardson, filed pro se brief.

Charles A. Graddick, Atty. Gen., and Samuel J. Clenney, III, Asst. Atty. Gen., for the State.

PER CURIAM.

This is a death penalty case. Petitioner was tried and convicted of intentionally killing a person by wilfully causing an explosion near a dwelling house. He was sentenced to death pursuant to Code 1975, § 13-11-1, et seq. The Court of Criminal Appeals affirmed his conviction. *Richardson v. State*, [1978], 376 So.2d 205 (Ala.Cr.App.1978). This Court granted certiorari to review his conviction on the ground that this was a death case. Rule 39(c) ARAP. We affirm.

The facts of the case are sufficiently set forth in the decision of the Court of Criminal Appeals.

[1, 2] Petitioner makes two allegations of error: (1) that the initial warrantless search of his automobile was illegal; (2) that the search of his home was conducted pursuant to an improperly issued search warrant. We find no merit in either contention made by petitioner. We agree with the appellate court that *Cady v. Dombrowski*, 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973), is applicable and controlling with regard to the automobile search. Regarding the insufficiency of the search warrant for the house, we agree with the reasoning of the Court of Criminal Appeals and cite the following authorities in support of the reasoning of that court: *Franks v. Delaware*, 438 U.S. 154, 98 S.Ct. 2674, 57 L.Ed.2d 667 (1978); *Rugendorf v. United States*, 376 U.S. 528, 84 S.Ct. 825, 11 L.Ed.2d 887 (1964); *United States v. Thomas*, 489 F.2d 664 (5th Cir., 1973) cert. denied 423 U.S. 844, 96 S.Ct. 79, 46 L.Ed.2d 64 (1975).

[3] We have carefully reviewed the record and find that petitioner's conviction is adequately supported by the evidence.

AFFIRMED.

TORBERT, C. J., and BLOODWORTH, MADDOX, JONES, ALMON and SHORES, JJ., concur.

FAULKNER, EMBRY and BEATTY, JJ., dissent.

his mother positively identified him as the man who entered her house on the night of December 19, 1974, and struck her twice on the head, Burford Garrett transported him to the authorities where he was formally arrested. We hold there was a legal arrest under the facts and circumstances of this case.

[3] In a long line of cases we have held that alibi evidence is always a jury question. Ala.Dig.Criminal Law, ⇐ No. 739(2).

We have carefully searched the record for errors injuriously affecting the substantial rights of appellant and have found none.

The judgment of conviction is affirmed.

AFFIRMED.

All the Judges concur.

Re Ronnie PARKER

v.

STATE of Alabama.

Ex parte Ronnie Parker.

77-545.

Supreme Court of Alabama.

June 30, 1978.

Certiorari to the Court of Criminal Appeals.

Mark B. Polson, Birmingham, for petitioner.

No brief for the State, respondent.

EMBRY, Justice.

We deny the writ because it is clear from the Court of Criminal Appeals' opinion, 360 So.2d 344, that this offense occurred at least after 6:30 P.M. on December 19, 1974, which we know to be nighttime.

We do not necessarily agree with the rule announced in the opinion to the effect that nighttime, as it relates to burglary, begins at sunset. See footnote one in *Gaskin v. State*, 53 Ala.App. 64, 297 So.2d 388 (1974).

WRIT DENIED.

TORBERT, C. J., and BLOODWORTH, FAULKNER and ALMON, JJ., concur.

App. #4.

William R. WATERS, Jr.

v.

STATE.

4 Div. 518.

Court of Criminal Appeals of Alabama.

May 2, 1978.

Rehearing Denied May 30, 1978.

By a judgment of the Circuit Court, Houston County, Forrest L. Adams, J., the defendant was convicted of buying, receiving and concealing stolen property and he appealed. The Court of Criminal Appeals, Bookout, J., held that: (1) defendant had standing to challenge the initial illegal search of warehouse which led to the search of his apartment in which other stolen property was discovered, and (2) since the chain of evidence leading from the illegal search of warehouse to the search of apartment was clear and unbroken, evidence obtained as result of apartment search must be considered as fruit of poisonous tree and therefore inadmissible.

Reversed and remanded.

DeCarlo, J., concurred in the result.

Writ denied, Ala., 360 So.2d 358.

1. Searches and Seizures ⇐7(26)

Fourth Amendment rights are personal in nature and may be asserted by only those whose own protection has been infringed by the search and seizure. U.S.C.A.Const. Amend. 4.

2. Criminal Law ⇐394.5(2)

When possession of seized evidence is an essential element of offense, prosecution is precluded from denying that defendant had requisite possessory interest to challenge admissibility of evidence. U.S.C.A. Const. Amend. 4.

3. Searches and Seizures ⇐7(26)

Person legitimately on premises when search occurs may assert a Fourth Amendment right even though he has no possessory interests in premises. U.S.C.A.Const. Amend. 4.

4. Searches and Seizures ⇐7(26)

Defendant charged with possession and concealment of stolen property had standing to challenge the illegal search of warehouse space in name of another, in which police observed certain stolen property and which in turn led to the subsequent search of defendant's apartment in which police found more stolen property. U.S.C.A. Const. Amend. 4.

5. Searches and Seizures ⇐7(10)

Protection of Fourth Amendment against unreasonable searches and seizures extends to commercial warehouse. U.S.C. A.Const. Amend. 4.

6. Searches and Seizures ⇐3.3(2)

Informant's tip may be sole basis for probable cause for search provided it meets the veracity prong and the basis of knowledge prong. U.S.C.A.Const. Amend. 4.

7. Searches and Seizures ⇐3.6(3)

Affidavit for search warrant merely reciting that affiant received information from a reliable informant, leaving magistrate with only officer's conclusion that the informant was reliable, and failing to set out any of the underlying circumstances to show how informant became aware of knowledge was insufficient to establish probable cause for issuance of warrant. U.S.C.A.Const. Amend. 4.

8. Searches and Seizures ⇐3.6(2)

Affidavit for search warrant on basis of information from an informant must supply magistrate sufficient information to enable him to make judicial determination of reliability of informant rather than depend solely on officer's conclusion; minimum information allowable for such purpose is a statement that information came from a person whose record of reliability for correctness has been good. U.S.C.A. Const. Amend. 4.

9. Searches and Seizures ⇐3.6(3)

Even if an informer's tip fails to meet the veracity prong or the basis of knowledge prong with respect to testing sufficiency of affidavit for issuance of search warrant, informant's tip may still constitute sole basis for finding of probable cause if his information is in such detail and minute particularity that magistrate when confronted with such detail could reasonably infer that informant gained his information in a reliable way.

10. Criminal Law ⇐394.1(3)

Since record showed that search of apartment of defendant which led to discovery of the stolen property was the end result of exploitation of information obtained by prior illegal police search of warehouse evidence obtained as result of search of apartment must be considered as fruit of the poisonous tree and inadmissible in prosecution for possession and concealment of stolen property. U.S.C.A.Const. Amend. 4.

11. Criminal Law ⇐938(1)

Generally, motion for a new trial is addressed to sound discretion of trial judge who may grant the same on a showing of newly discovered evidence which could not have been discovered with due diligence before trial.

12. Criminal Law ⇐938(1)

Newly discovered evidence justifying granting of new trial must be such that it would probably change results of trial, must be material, not merely impeaching or

merely cumulative and must not be addressed to minor discrepancies in the testimony.

William H. Mills, of Rogers, Howard, Beddow & Mills, Birmingham, for appellant.

William J. Baxley, Atty. Gen., and John R. Rucker, III, Asst. Atty. Gen., for the State, appellee.

BOOKOUT, Judge.

Buying, receiving, and concealing stolen property; sentence: six years imprisonment.

Mrs. Mae Stembridge of Dothan, Alabama, who had temporarily vacated her home because of fire damage, returned to the home on February 3, 1976, and found that her dining room table and chairs, two marble top tables, one antique dresser, and a china closet had been stolen. The appellant and his girl friend were charged with the unlawful possession of those items by an indictment which, in pertinent part, was as follows:

"William R. Waters, Jr., alias Billy Waters and Lethia Speigner, whose names are to the Grand Jury otherwise unknown, did, buy, receive, conceal or aid in concealing, one antique china cabinet, one antique Victorian dresser and antique furniture of the aggregate value of to-wit: $7000.00, the personal property of Mae Stembridge, knowing that they were stolen and not having the intent to restore them to the owner. . . ."

The stolen items listed in the indictment were recovered through a search of the appellant's apartment. Police officers were led to the apartment based upon information they obtained as a result of a search of a local warehouse. The search of the warehouse was based upon information furnished to officers by an undisclosed confidential informant. By way of a pretrial motion and hearing, objections during trial, and by motion for a new trial and a hearing thereon, the appellant challenged the admissibility of the fruits of the search. The ruling of the trial judge in each instance was adverse to the appellant.

The facts presented on the pretrial motion and during trial, upon which the search warrant was issued and the trial court based its decision, are completely different than the evidence adduced upon the motion for a new trial. We will summarize the facts as they ultimately appeared.

On October 19, 1976, Dothan Police Officer James Wachob received information from a confidential informant, known by Wachob for a year and a half, who told him that a rental warehouse in town contained furniture stolen by the appellant. The informant gave Wachob keys to the warehouse and to the appellant's apartment, but did not give him the name of the warehouse. Officers Wachob and Locke contacted Mrs. Gladys Jackson, manager of the Store-All Warehouse in Dothan, and asked if William Waters had rented a storage unit from her. She stated that he had not; however, the officers returned the next day and asked if a woman had rented space recently. Mrs. Jackson went through her files for the officers, and the name Lethia Speigner turned up. Mrs. Jackson told the officers that Lethia Speigner had rented the warehouse space some two months earlier, and at that time she observed Mrs. Speigner storing in the warehouse a white wicker baby carriage and other antique furniture.

After Mrs. Jackson had closed the warehouse office for the day, Wachob and Locke returned, without a search warrant, and opened the storage unit with the key furnished by the informant. They observed the contents of the storage unit and unwrapped a bundle containing several guns. They copied down the serial numbers of the guns and returned them to the same position in the warehouse where they were found. Among the items observed during the illegal entry was a wicker baby carriage.

The two officers returned to the police station and made inquiry through the Alabama Criminal Justice Information System (ACJIS) computer as to whether the guns in question had been stolen. No guns of

the same serial numbers were listed with the ACJIS as stolen.

The two officers then called the police departments in the cities of Montevallo, Eufaula, and Enterprise to determine if any of the items observed in the warehouse had been reported stolen in those cities. They were informed by police in Enterprise that a wicker baby carriage and other items had been stolen from the residence of Mrs. Margaret A. Rawls about a year earlier on October 30, 1975. Officer Wachob drove to Enterprise that night and obtained copies of various offense reports from the Enterprise Police Department. The wicker baby carriage was listed in one of those reports.

The next morning, October 21, 1976, Wachob went to the district attorney's office where an affidavit was prepared which he presented to the Dothan City Recorder (municipal judge). The officer gave no sworn testimony before the Recorder, and the search warrant was based solely upon the affidavit.

The affidavit was in pertinent part as follows:

". . . there is now being concealed in warehouse no. 232, Store-All Warehouse, 310 Bic Road, Dothan, Alabama, property which was stolen from the residence of Mrs. Margaret A. Rawls, 301 W. College, Enterprise, Alabama, on October 30, 1975, said stolen property being more particularly described as follows: Antique furniture, including one white wicker baby carriage. Affiant's probable cause for believing that the above-described items are concealed at the above-mentioned location is as follows: Affiant received information from a *reliable informant* within the past 48 hours to the effect that Billy Waters had stolen furniture and weapons stored in a local (Dothan) rental warehouse. Affiant checked a local Dothan warehouse and found that Lethia Speigner, known to affiant as a frequent companion of Billy Waters, had rented a warehouse there . . . said warehouse being no. 232. Affiant contacted the manager of the above described Store-All Warehouse, and found that: (1) Billy Waters had attempted to rent a warehouse there within the last 2 months but had been turned down; and (2) the day the manager rented the above-described no. 232 warehouse to Waters' known companion, Alethia (sic) Speigner, which was rented to Speigner after Waters had been refused rental of a warehouse, the manager of the above-described warehouse, Mrs. Jackson, observed Lethia Speigner unloading numerous antiques and storing them in the above-described warehouse no. 232, among them a white wicker baby carriage, distinct in appearance, and *exactly matching the description of the white wicker baby carriage which had been stolen* from the residence of Mrs. Margaret A. Rawls. . . . " (Emphasis supplied.)

Armed with a search warrant based upon the above affidavit, Wachob, Locke, and other officers returned to the warehouse and again opened the storage unit with the key furnished by the informant. During the search and inventory of the items, a food stamp identification card and a card table were found which bore the appellant's name. Officer Locke and an investigator then went to 92 Colony Square Apartments around 11:00 A.M. in order to locate the appellant or Lethia Speigner.

When the officers reached the apartment, they knocked and Lethia Speigner came to the door. The officers immediately placed her under arrest, and she stepped outside and closed the door behind her. Neither Investigator Hobbs nor Officer Locke went inside the apartment. When Lethia Speigner answered the officers' knock, Officer Locke was able to see through the cracked door momentarily. He observed a desk and what appeared to be a portion of a keyboard of a typewriter. He could not see the body of the typewriter but could determine that the keyboard was white. Locke was not close enough to ascertain the shape of the typewriter keys nor the trade name of the typewriter. However, he went to the Recorder's Court that afternoon and executed a search warrant affidavit which was in pertinent part as follows:

". . . Harold Locke . . . deposes and says that he has probable cause to believe and does believe that certain articles taken in the burglary of Whittaker and Warren Insurance Co., Enterprise, Alabama, which burglary occurred on August 20, 1976, are being concealed in the residence of Lethia Speigner and Billy Waters which is located at no. 92 Colony Square Apartments, Dothan, Alabama, said stolen articles being more particularly described as follows: an Olympia typewriter, serial # 141086, and a Casino hand calculator, black in color. Affiant's probable cause for believing that the above-described stolen articles are located at the above-described residence is as follows: (1) Based *partly* on information received from Mrs. Jackson, manager of Store-All Warehouse, Inc., 310 Bic Road, Dothan, Alabama, to the effect that she had rented Lethia Speigner warehouse no. 232 . . . approximately 2½ months ago, and, shortly after, had observed Lethia Speigner moving various antiques into said warehouse # 232, including a white wicker baby carriage which exactly matched the description of a baby carriage which was taken in the burglary of Margaret A. Rawls . . . affiant obtained a search warrant this date (10/21/76) for Warehouse no. 232. . . . (2) Affiant executed said search warrant and found numerous items of stolen merchandise which had been taken in several recent burglaries in Dothan, Alabama and Enterprise, Alabama . . . *including numerous personal effects of one Billy Waters*, whom affiant knows to be a frequent companion of Lethia Speigner, and whom affiant knows to be residing with Lethia Speigner at the present time in a residence listed in Billy Waters' name, said residence being located at # 92 Colony Square Apartments, Dothan, Alabama. (3) Immediately upon finding this stolen merchandise, which did not include the Olympia typewriter . . . and the Casino hand calculator . . . affiant proceeded to Apt. # 92, Colony Square Apartments . . . for the purpose of arresting Lethia Speigner. . . . Lethia Speigner answered the affiant's knock at the door, opened it, and affiant immediately saw, behind her, within this apartment, lying on the table, a typewriter which, *as near as affiant could tell, matched the description of the above-described typewriter* taken in the aforementioned burglary. . . ." (Emphasis supplied.)

Both Officers Wachob and Locke concealed their illegal entry into the warehouse prior to obtaining the search warrant. In sworn testimony given during the suppression hearing, both officers testified that they had not opened the warehouse prior to obtaining the search warrant. During examination of Wachob, the following occurred:

"Q. Sergeant Wachob, at any time before you went to the store or warehouse with a search warrant on October 21st, and opened the door with a key at that time, had you ever attempted to use that key on that door at any previous time?

"A. No, sir, I had not.

"Q. Had you ever tested to see if it work?

"A. No, sir, I had not.

"Q. Had anyone else connected with the Dothan Police Department, to your knowledge?

"A. No, sir. Not to my knowledge, no one from the police department had."

* * * * * *

"Q. Did you ever try any other keys at the Stor-All Warehouse to see if they would open any of the doors there?

"A. No, sir.

"Q. At any other time, before you went there with the search warrant?

"A. No. sir.

"Q. Anybody else, to your knowledge?

"A. No, sir, not to my knowledge."

During the examination of Officer Locke, the following occurred:

"Q. Now, on that occasion—I'm talking about the afternoon of the 20th, when you were at the Stor-All Warehouse, did either of you or Sergeant Wachob have any keys?

"A. Sergeant Wachob had some keys.

"Q. Did he test any of these keys to see if they would fit any of the locks at the warehouse?

"A. No, sir."

It was not until after the trial that defense attorneys discovered evidence which caused the police officers in question to recant and tell the truth. Attorneys for the appellant requested information from the ACJIS concerning the inquiry made by the Dothan police concerning stolen articles found in the warehouse. It was only then that the appellant's attorneys discovered that Officers Wachob and Locke had, on the night before obtaining the search warrant, furnished the ACJIS with the serial numbers of the guns stored in the warehouse. Thus, during the hearing on the motion for a new trial, the newly discovered evidence came to light. Officers Wachob and Locke then testified that they had entered the warehouse the night before obtaining the search warrants and had furnished the ACJIS with the serial numbers of the weapons found in the warehouse prior to the search. After receiving negative reports from the ACJIS computer, the two officers then placed telephone calls to police departments in cities where they knew the appellant had some connection.

Wachob testified that after they had looked into the warehouse on October 20, the calls were made to other police departments. He stated that he went to Enterprise that night after Locke had talked to someone with the Enterprise Police Department. He picked up offense reports and discussed the baby carriage with Lt. Rainey of the Enterprise Police Department. Wachob stated that, "the purpose that I went to Enterprise for was to get his report on the baby carriage." He testified that at the time he first looked inside the warehouse, the only information he had about the baby carriage was what Mrs. Jackson had told him.

Officer Locke testified that after the ACJIS inquiry resulted in a negative reply, he placed a call to Enterprise and talked to Lt. Rainey of that police department. He gave Rainey the serial numbers of the weapons and inquired about the white wicker baby carriage. Prior to observing the carriage during the warrantless search, the only information Officer Locke had concerning it was what Mrs. Jackson had told him, that being that she had seen Lethia Speigner storing a white baby carriage and some antique furniture in the warehouse about two months earlier. From the evidence adduced on the motion for new trial, it appears that neither Officer Locke nor Wachob knew that a white wicker baby carriage had been stolen until after they observed it during the warrantless search and later called the Enterprise Police Department. The trial court overruled appellant's motion for new trial.

STANDING

The State, on appeal, challenges the appellant's standing to object to the search of the warehouse which in turn led to the search of the apartment. The State contends that, since the warehouse was not rented in the appellant's name, he has no standing to avail himself of the protection of the Fourth Amendment.

The State finds its primary support in the case of *Alderman v. United States*, 394 U.S. 165, 89 S.Ct. 961, 22 L.Ed.2d 176 (1968). That case involved the use of evidence obtained through illegal electronic surveillance of a co-conspirator. The Supreme Court refused to expand the exclusionary rule, stating that a Fourth Amendment right may only be urged by those whose rights were violated by the search itself, and that co-conspirators and co-defendants have been accorded no special standing. However, in *Alderman*, it appears that the appellant's premises were not the subject of the surveillance and neither were his private conversations intercepted. There, a co-defendant's premises were under surveillance and conversations between two other parties implicated the appellant. The facts in the instant case are altogether different and, therefore, *Alderman* does not apply.

[1] Fourth Amendment rights are personal in nature and may be asserted only by those whose own protection has been infringed by the search and seizure. At one time, a defendant asserting such a right had to establish that he was the owner or possessor of the seized property or that he had a possessory interest in the premises searched. However, the Supreme Court relaxed the standards for establishing standing in *Jones v. United States*, 362 U.S. 257, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960). The standards now applying are:

[2] (1) When possession of the seized evidence is an essential element of the offense, the prosecution is precluded from denying that the defendant has the requisite possessory interest to challenge admissibility of the evidence; and

[3] (2) A person legitimately on the premises when the search occurs may assert a Fourth Amendment right even though he has no possessory interest in the premises. *Jones*, supra; *Simmons v. United States*, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968).

In the instant case, the appellant is charged with a possessory crime. The State's affidavit to obtain the warrant to search the warehouse stated specifically that an informant provided information, "that Billy Waters had stolen furniture and weapons stored in a local (Dothan) rental warehouse." After the warehouse was searched, a second affidavit was executed for a warrant to search the appellant's apartment. That affidavit set out the circumstances of the warehouse search, stating that numerous items of stolen merchandise had been found therein, "including numerous personal effects of one Billy Waters."

[4] After alleging in two search warrant affidavits that there was probable cause to believe Waters was concealing stolen property in a warehouse and in his apartment, the State now contends that he had no standing to challenge the searches. In effect, the State is charging him with possession and concealment of stolen property in the indictment, but maintaining in the suppression hearing that he did not possess the merchandise. This it cannot do. *Jones v. United States; Simmons v. United States*, supra. See also: *United States v. Jeffers*, 342 U.S. 48, 72 S.Ct. 93, 96 L.Ed. 59 (1960); *United States v. Harwood*, 470 F.2d 322 (10th Cir. 1972).

THE WAREHOUSE WARRANT

[5] The protection of the Fourth Amendment extends to a commercial warehouse. *See v. City of Seattle*, 387 U.S. 541, 87 S.Ct. 1737, 18 L.Ed.2d 943 (1967). Also see: *Adair v. State*, 53 Ala.App. 251, 98 So.2d 671 (1974). Since we determine that appellant has standing to challenge the searches, the next strand of this Gordian knot to unravel is that of the effect of the illegal warehouse search on subsequent actions taken by the police.

[6] The officers were initially led to the warehouse through the tip of a confidential informant. Probable cause may be based solely upon hearsay information obtained from a reliable informant. *Jones v. United States, supra; Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964); *Clenney v. State*, 281 Ala. 9, 198 So.2d 293 (1966). The informant's tip may be the sole basis for probable cause provided it meets the two pronged test of *Aguilar:* the veracity prong and the basis of knowledge prong.

[7, 8] In the instant case, the affidavit fails to meet either prong of the *Aguilar* test. First, the affidavit merely recites that the affiant received information from, "a reliable informant." The magistrate is left with only the officer's conclusion that the informant is reliable. The law requires that the magistrate be given sufficient information to enable him to make a judicial determination of reliability of the informant rather than depending solely upon the officer's conclusion. The minimum information allowable for this purpose in an affidavit in Alabama is a statement that the information came from, "a person whose record of reliability for correctness has been good." *Neugent v. State*, Ala.,

340 So.2d 52 (1976); *State ex rel. Attorney General*, 286 Ala. 117, 237 So.2d 640 (1970). The conclusion that officers "received reliable information from a credible person" was condemned in *Aguilar*, supra. An affidavit that the FBI " 'has been informed by a confidential reliable informant' " was condemned in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 21 L.Ed.2d 637 (1969).

Secondly, the instant affidavit fails to set out any of the underlying circumstances to show how the informant learned of the stolen items being stored where he says they were stored. Again, the magistrate is left only with the officer's mere conclusion that the informant's hearsay information was correct.

Judge Charles E. Moylan, Jr., of the Maryland Court of Special Appeals, sets forth with exceptional clarity the functions of a magistrate in evaluating hearsay information. In "Hearsay and Probable Cause: An Aguilar and Spinelli Primer," Mercer Law Review, Vol. 25, p. 741 (1974), Judge Moylan states:

"Just as the magistrate must satisfy himself as to the credibility of a primary source by administering an oath to him and by looking at him, so too must he, by some alternative means, satisfy himself as to the credibility of the secondary source. In neither case may he accept someone else's conclusion in lieu of arriving at his own. Just as he may not permit an affiant's assertion as to his own credibility to serve as dispensation for the oath, neither may he permit the affiant's assertion as to his informant's credibility to serve as dispensation for the required recital of all necessary data about that informant that will permit the magistrate to draw his own conclusion as to credibility. This, simply, is the 'credibility/reliability' or 'veracity' prong of *Aguilar*.

"Once the magistrate has decided that the informant is believable, he has still only half completed his ultimate determination. He must still decide what the information is worth. He has decided that the source is not lying, but he has not yet decided whether the source is mistaken. The magistrate's second function is now to evaluate the information which he is accepting as true and to see what probabilities emerge from that available data. Again, he may not accept the conclusion of either the affiant-observer or the nonswearing informant. He must take from either of these sources his facts and then arrive at his own conclusion as to the significance of those facts."

[9] Thus, the instant affidavit fails to meet either prong of the tests set out in *Aguilar* and *Spinelli*, *supra*. However, if a tip fails one of these prongs, the informant's tip may still constitute the sole basis for a finding of probable cause if his information is in such detail and minute particularity that the "magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way." *Spinelli*, *supra*. This is the self-verifying tip. *Hatton v. State*, Ala.Cr.App., 359 So.2d 822 [Ms. November 15, 1977]. In the instant case, we find the informant's tip completely lacking in detail.

Less detailed information from a *reliable* source may also establish probable cause where the key elements of the information are verified or corroborated. *State ex rel. Attorney General*, *supra*; *Payton v. State*, 47 Ala.App. 347, 254 So.2d 351 (1971). Finally, a tip that will not meet any of these standards may still be used in conjunction with a number of other factors to support a finding of probable cause. *Hatton*, *supra*.

In *United States v. Squella-Avendano*, 447 F.2d 575 (5th Cir. 1971), at 580, it was stated:

" . . . First, if the information provided is in such 'detail' and 'minute particularity' that 'a magistrate, when confronted with such detail, could reasonably infer that the informant had gained his information in a reliable way,' then the report, if sufficiently incriminating, may, without more, be grounds for finding probable cause. Secondly, less detailed information from a reliable source may

be used as grounds for a finding of probable cause if independent investigation by law enforcement agencies yields sufficient verification or corroboration of the informant's report to make it 'apparent that the informant had not been fabricating his report out of whole cloth.' Corroboration must render the report 'of the sort which in common experience may be recognized as having been obtained in a reliable way.' Thirdly, even a report that is not under the above two standards sufficient of itself to establish probable cause may count in the magistrate's determination of probable cause, but only as one of a number of other factors of 'further support' tending to show probable cause. Examples of satisfactory 'further support' given in *Spinelli* involved law enforcement agencies' knowledge of independent facts which suggest criminal conduct or of facts which take on an aura of suspicion in light of the informant's tip." (Footnotes omitted.)

Here, although the affidavit does not satisfy the two pronged test set out above, it may have nevertheless appeared to the magistrate that the affiant had made an independent investigation based upon the informant's tip and had determined that a stolen baby carriage had been stored in the warehouse in question by the appellant's girl friend sometime within the prior two months. However, there is no showing in the affidavit that the officers had probable cause to believe that the baby carriage would still be stored in the warehouse on October 21. Evidence taken on the appellant's motion to suppress would not support the officers' belief that a wicker baby carriage was still stored in the warehouse at the time the affidavit was prepared. Additionally, the warehouse manager, Mrs. Jackson, gave conflicting testimony concerning the baby carriage. She first testified that she did not tell the investigating officers that she saw a baby carriage being stored in the warehouse on the date that Lethia Speigner rented the storage unit. On further examination, she said that she did disclose that fact to the officers; then during further testimony, she stated that she did not remember. But assuming arguendo that the affidavit on its face states sufficient facts to establish probable cause, we are still left with the ultimate fact, established on motion for a new trial, that much of the information contained in the affidavit, independent of the informant's tip, came about through leads obtained by way of the illegal search conducted on the night of October 20.

The State's contention is that the information contained in the affidavit was "obtained *entirely* from independent sources." The State contends that the "fruit of the poisonous tree" doctrine applies only to evidence that is obtained as a result of the prior illegality, citing *Silverthorne Lumber Company v. United States*, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed.2d 319 (1920). It contends in its brief that the information received from Mrs. Jackson and the informer was the "fruit of a healthy tree" and that the officers' prior information did not become unusable merely because they saw objects (the baby carriage) during the illegal search which they already knew about.

The fallacy in the State's position relative to the independent source doctrine is that the officers did not know that a baby carriage had been stolen at the time they committed the illegal entry into the warehouse on October 20. Both officers later testified that the only information they had at the time of the illegal search was what Mrs. Jackson had told them. Both stated that the only thing Mrs. Jackson told them was that she had observed Lethia Speigner storing a white baby carriage in the warehouse some two and one-half months earlier. At the time of their illegal entry, the officers did not know (1) whether the baby carriage was still in the warehouse, (2) whether that baby carriage was stolen property, or (3) whether *any* baby carriage of a similar description had been reported stolen. It was only after they had burglarized the warehouse that they verified that the wicker baby carriage was still there. It was only after confirming that fact by illegal means that the officers then began to

call other cities making inquiry about a wicker baby carriage. It was only after calling three cities that the officers discovered that such a carriage had been stolen in Enterprise almost a year earlier. It was only then that they could state in the affidavit that there was a carriage in the warehouse "exactly matching the description of the white wicker baby carriage which had been stolen."

It is obvious that confirmation of the existence of the carriage, through the illegal search, is what led the officers forward in their inquiries to the other cities to determine if such a carriage had in fact been stolen. The record reveals that the illegal warehouse search provided the impetus for the officers' further investigation and so influenced all their future actions in this case that its taint is evident in everything the officers did or said thereafter.

The purpose of the exclusionary rule is "to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." *Elkins v. United States*, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960); *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). The exclusionary rule would thus deny the State the use of any evidence it obtained as a result of the illegal warehouse search. The next question presented then is whether the search of the appellant's apartment came as a result of the prior search of the warehouse.

THE APARTMENT SEARCH

An examination of the affidavit supporting the warrant to search the apartment reveals the following:

(1) A typewriter and a hand calculator were alleged to have been stolen from Enterprise two months earlier;

(2) Based "partly" on information received from Mrs. Jackson, the warehouse had been searched;

(3) The warehouse search revealed numerous stolen items stored there, "including numerous personal effects of one Billy Waters;"

(4) The affiant knew Waters to be a frequent companion of Lethia Speigner, both residing at the appellant's apartment;

(5) Since the stolen merchandise at the warehouse did not include the typewriter and hand calculator, the affiant apparently concluded that those two items must be at the apartment;

(6) That when the affiant went to the apartment to arrest Lethia Speigner, he saw a typewriter which, "as near as affiant could tell," matched the description of the stolen typewriter in question.

Since Officer Locke swore to the affidavit, the magistrate had no reason to doubt the truth of the statements contained therein. Taken at face value, the affidavit would support the issuance of a warrant. Likewise, evidence presented during the hearing on the motion to suppress did not contradict the facts set out in the affidavit. On the motion to suppress, the trial judge therefore was not in error in finding that probable cause did exist for the issuance of the warrant to search the apartment. However, evidence taken during the hearing on the motion for a new trial was altogether different than that presented initially to the magistrate or to the trial judge on the motion to suppress.

Evidence on the motion for a new trial along with prior evidence in the case would support the following findings:

(1) Information obtained by the officers during the illegal search of the warehouse prompted their inquiry to the Enterprise Police Department. The Enterprise Police Department then furnished the Dothan officers with copies of offense reports from which affiant obtained the information concerning the baby carriage, the typewriter, and the hand calculator which appeared in his affidavit to obtain the warrant to search the apartment;

(2) Leading officers to the appellant's apartment was the discovery of "numerous personal effects" of the appellant during the warehouse search;

(3) The affiant deduced that the typewriter and hand calculator were probably at the appellant's apartment simply because they were not turned up in the search of the warehouse;

(4) Officer Locke only had a momentary glimpse through a crack in the door of the apartment and saw only what appeared to be a keyboard of a typewriter;

(5) The officer had no description of the stolen typewriter except its trade name and serial number;

(6) His observation of the keyboard inside the apartment was so poor that he could not ascertain whether the keys were round or square or the color of the typewriter body;

(7) That in fact the only typewriter found in the apartment was an antique black L. C. Smith typewriter rather than a gray Olympia typewriter, and furthermore the hand calculator was not found in the apartment either;

(8) Officer Locke's testimony established that his recitation in the affidavit comparing the typewriter he saw with the description of the stolen typewriter was completely invalid. The qualifying phrase, "as near as affiant could tell," added nothing to its credibility.

In *McConnell v. State*, 48 Ala.App. 523, 266 So.2d 328 (1972), this court reversed a conviction for buying, receiving, and concealing stolen property where another Dothan police officer had made false statements in an affidavit to obtain a search warrant. This court found the affidavit to be sufficient on its face, but held the search warrant to be invalid because material statements in the supporting affidavit were subsequently contradicted and proven erroneous by the testimony of the affiant himself. In *McConnell*, this court quoted from *Walker v. Graham*, 228 Ala. 574, 154 So. 806 (1934), stating:

"'. . . [N]o one will be permitted to wrongfully procure the issuance of a process by practicing a fraud or imposition upon the court or authority, and seek shelter behind such a process, though it be ever so regular upon its face. . . .'"

CONCLUSION

[10] After a review of the evidence submitted on the motion for a new trial and considering the totality of the circumstances of the entire case, we can only come to the conclusion that the search of the apartment was the end result of an exploitation of information obtained by the illegal search of the warehouse. The chain of evidence leading from the illegal search of the warehouse to the search of the apartment is clear and unbroken. The evidence obtained as a result must be considered as "fruit of the poisonous tree" and, therefore, inadmissible. *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

[11, 12] The one remaining issue concerns the trial court's overruling of the motion for a new trial. Generally, a motion for a new trial is addressed to the sound discretion of the trial judge. Such a motion may be granted upon a showing of newly discovered evidence which could not have been discovered with due diligence before trial. The newly discovered evidence must be such that it would probably change the results of the trial; must be material; not merely impeaching; not merely cumulative; and must not be addressed to minor discrepancies in testimony. *Lackey v. State*, 41 Ala.App. 46, 123 So.2d 186, cert. denied, 271 Ala. 699, 123 So.2d 191 (1960).

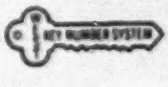
In the instant case, evidence of the officers' illegal search of the warehouse had been concealed and was such that it could not have been reasonably discovered with due diligence by the defense before trial. The evidence presented on the motion for a new trial was such that, had it been known and presented during the hearing on the motion to suppress, it would have changed the results of the trial in that suppression of the evidence would have been mandated. The newly discovered evidence presented was certainly material, was not cumulative, and was not introduced for the purpose of merely impeaching testimony of other witnesses given during the course of the trial.

The appellant's motion for a new trial should therefore have been granted.

The appellant is presently under a five year sentence for burglary from Barbour County which this court affirmed in *Waters v. State*, Ala.Cr.App., 357 So.2d 368 [1978]. He is also under a five year sentence from Houston County on another charge of buying, receiving, and concealing stolen property which we have this date also affirmed. However, due to the reason set out herein, appellant is entitled to a new trial on the instant charge.

REVERSED AND REMANDED.

All the Judges concur except DeCARLO, J., concurs in result only.



Ex parte STATE of Alabama ex rel. ATTORNEY GENERAL.

77-586.

Supreme Court of Alabama.

June 30, 1978.

Certiorari to the Court of Criminal Appeals, 360 So.2d 347.

JONES, Judge.

WRIT DENIED.

TORBERT, C. J., and MADDOX, SHORES and BEATTY, JJ., concur.

William R. WATERS, Jr., alias

v.

STATE.

4 Div. 578.

Court of Criminal Appeals of Alabama.

May 2, 1978.

As Corrected On Denial of Rehearing May 30, 1978.

By a judgment of the Circuit Court, Houston County, Forrest L. Adams, J., the defendant was convicted of buying, receiving, or concealing stolen property and he appealed. The Court of Criminal Appeals, Bookout, J., held that: (1) State did present evidence sufficient to establish corpus delicti; (2) evidence was sufficient to show a proper chain of custody of stolen items from person who bought them from defendant; (3) failure to raise at trial objection that proper predicate was not laid before jury for admission of confession waived any alleged error; (4) confession was properly admitted although defendant refused to sign written waiver form, and (5) trial court did not abuse discretion in allowing cross-examination of defense witness concerning her arrest to show bias.

Affirmed.

Writ denied, Ala., 360 So.2d 367.

1. Receiving Stolen Goods ⇐1

Elements State is required to prove in case of buying, receiving, or concealing stolen goods are that the goods in question have been feloniously taken away by someone, that defendant bought, received, concealed, or aided in concealing the goods, knowing that they were stolen and without an intent to restore them to the owner. Code of Ala., Tit. 14, § 338.

2. Receiving Stolen Goods ⇐8(3)

Evidence as to damage to store building and the disappearance of a number of items was ample evidence to prove the felonious taking of goods by someone in posse-

Office-Supreme Court, U.S.
FILED
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ALEXANDER L. STEVAS,
CLERK

No. 82-5987

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HERBERT LEE RICHARDSON,

Petitioner

v.

STATE OF ALABAMA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE ALABAMA COURT OF CRIMINAL APPEALS

RESPONDENT'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to decide federal questions which were not addressed in the state appellate court decision below because of the limited nature of the state procedural remedy being sought?

2. Should certiorari be granted to review a federal question not presented by the facts?

3. Does Beck v. Alabama, 447 U.S. 625 (1980), as clarified by Hopper v. Evans, 102 S. Ct. 2054 (1982), require that every Alabama pre-Beck capital conviction and death sentence be set aside regardless of the circumstances?

PARTIES

The caption contains the names of all the parties in the court below.

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42 U.S.C. §1983	2
Code of Alabama 1975, §13-11-2(a)(9)	2

OPINIONS BELOW

1. The opinion of the Alabama Court of Criminal Appeals affirming the trial court's denial of the petition for a writ of error coram nobis is reported as Richardson v. State, 419 So. 2d 289 (Ala. Cr. App. 1982), and is attached to this brief as Appendix A.

2. No opinion was issued by the Alabama Supreme Court when on October 1, 1982, it denied the petition for a writ of certiorari to review the Court of Criminal Appeals' decision. A copy of the notification announcing the denial of certiorari is attached to this brief as Appendix B.

JURISDICTION

The Alabama Supreme Court's order denying the petition for a writ of certiorari to review the Alabama Court of Criminal Appeals' decision was entered October 1, 1982. On November 24, 1982, Justice Powell signed an order extending petitioner's time for filing a petition for a writ of certiorari to and including December 30, 1982.

This Court has jurisdiction pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The petition discusses questions involving the Fourth, Eighth, and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

On August 16, 1977, a young black child named Rena Mae Collins was blown to bits by a bomb planted on her front porch in Dothan, Alabama. As a result, petitioner was convicted in Houston County Circuit Court on January 25, 1978, for the Code of Alabama 1975, §13-11-2(a)(9) capital offense of first degree murder involving the intentional killing of a person by means of an explosion near an inhabited dwelling house. On February 15, 1978, he was sentenced to death.

Petitioner's conviction and death sentence was affirmed on direct appeal in Richardson v. State, 376 So. 2d 205 (Ala. Cr. App. 1978), aff'd, 376 So. 2d 228 (Ala. 1979). No petition for certiorari was filed in this Court.

A 28 U.S.C. §2254 petition for a writ of habeas corpus petitioner had filed during the pendency of his direct appeal was dismissed by the United States District Court for the Middle District of Alabama on November 30, 1978, for failure to exhaust state remedies. Richardson v. Oliver, No. 78-89-S (M.D. Ala. unpublished order).

After his direct appeal was completed, petitioner filed another petition for a writ of habeas corpus and motion for a stay or execution in the United States District Court for the District of Alabama. On February 5, 1980, the court granted a stay of execution. On July 14, 1980, the court entered an order denying the petition for a writ of habeas corpus, and vacating the stay of execution. On September 9, 1980, the court denied petitioner's request for a certificate of probable cause. Richardson v. Oliver, No. 79-99-S (M.D. Ala. unpublished orders).[1]

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[1]While his second habeas petition (No. 79-99-S) was still pending, petitioner filed a complaint under 42 U.S.C. §1983 against a police officer who had been involved in a search and seizure leading to petitioner's conviction. That complaint was dismissed on July 10, 1980, and a request for a certificate of probable cause to appeal was denied on August 15, 1980. Richardson v. State, No. 80-0061-S (M.D. Ala. unpublished orders).

The proceeding that gave rise to the present certiorari petition began on April 10, 1981, when petitioner filed in the Circuit Court of Houston County, Alabama, a petition for a writ of error coram nobis. Thereafter, the court conducted an evidentiary hearing, and on September 18, 1981 entered an order denying the petition (R. 79). On June 29, 1982, that denial was affirmed by the Alabama Court of Criminal Appeals in an opinion published as Richardson v. State, 419 So. 2d 289 (Ala. Cr. App. 1982) (App. A). That court denied rehearing on July 27, 1982, and on October 1, 1982 the Alabama Supreme Court denied without opinion petitioner's petition for a writ of certiorari. Richardson v. State, No. 81-937 (Ala. Oct. 1, 1982) (unpublished order) (App. B). Petitioner then filed his certiorari petition in this Court.[2]

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[2]After it had affirmed his conviction and sentence on direct appeal, the Alabama Supreme Court set petitioner's execution for February 8, 1980. Ex parte Richardson, No. 78-183 (Ala. Nov. 13, 1979) (unpublished order). The United States District Court for the Middle District of Alabama entered a stay of execution on February 5, 1980, in order to consider petitioner's habeas petition, but vacated that stay when it denied the petition on July 14, 1980. Richardson v. Oliver, No. 79-99-S (M.D. Ala. unpublished orders).

No new date of execution has been set for petitioner, and no motion to have a new execution date set is pending.

SUMMARY OF ARGUMENT

Four of the five federal questions discussed in the certiorari petition involve search and seizure issues which were not decided by the court below because of the limited scope of the state writ of error coram nobis remedy. As to those issues, state law is an independent and adequate basis for the state court judgment denying petitioner's collateral attack on his conviction and sentence.

The other federal question raised by the certiorari petition concerns Beck v. Alabama, 447 U.S. 625 (1980). The issue presented by the facts and decided below concerns whether Beck requires the reversal of every Alabama pre-Beck capital conviction and sentence regardless of the facts and circumstances. The Alabama Court of Criminal Appeals holding that Beck did not mandate reversal absent some showing of prejudice is consistent with Hopper v. Evans, 102 S. Ct. 2049 (1982).

The issue of whether Beck requires the reversal of a pre-Beck capital conviction or sentence if the existence of the preclusion clause affected the trial tactics or conduct of the defendant is not before this Court. The petition for a writ of error coram nobis filed in this case did not even allege any such effect; petitioner offered no evidence of any such effect in the state court evidentiary hearing; and the Alabama Court of Criminal Appeals did not decide the issue because it was not presented by the facts.

ARGUMENT

I. CERTIORARI SHOULD NOT BE GRANTED ON THE SEARCH AND SEIZURE FEDERAL QUESTIONS BECAUSE THEY WERE NOT DECIDED BELOW, AND THE STATE COURT JUDGMENT RESTS ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND

The first five of the six federal questions the petition discusses involve the validity of certain searches and seizures which resulted in evidence used against petitioner at trial. Petition at 2 - 3 and 5 - 9. The validity of those searches and seizures was addressed at trial and on direct appeal, Richardson v. State, 376 So. 2d 205, 208-216 (Ala. Cr. App. 1978), aff'd; 376 So. 2d 228 (Ala. 1979), but the state courts refused to address the merits of those issues again in this proceeding. In affirming the denial of coram nobis relief, the Alabama Court of Criminal Appeals held:

> The appellant's first contention in his brief is that he should be granted a new trial because: (1) The affidavits used to obtain the search warrant for his automobile; and (2) The affidavits used to obtain the search warrant for his home were false. This issue was fully submitted by the appellant to the trial court, and there adjudicated, and upon appeal to this Court from his conviction, was affirmed by this Court. See Richardson v. State, Ala.Cr.App., 376 So.2d 205, and again confirmed by the Supreme Court of Alabama. See Ex Parte Richardson, Ala., 376 So.2d 228. This Court will not adjudicate again the same issues that have already been adjudicated between the same parties, over and over again on an application for a writ of error coram nobis. Richardson v. State, supra; Ex Parte Richardson, supra; Summers v. State, Ala. Cr.App., 366 So.2d 336; Ex Parte Rudolph, 276 Ala. 392, 162 So.2d 486, cert. den., 377 U.S. 919, 84 S.Ct. 1185, 12 L.Ed.2d 88; Impson v. State, Ala.Cr.App., 339 So. 2d 1098. We hold that the matters of the validity of the search warrants have been fully adjudicated, and the appellant may not again adjudicate them by this petition for a writ of error coram nobis.

Richardson v. State, 419 So. 2d 289, 291 (Ala. Cr. App. 1982).

Certiorari should not be granted to review the decision of the Alabama Court of Criminal Appeals insofar as the searches and seizures are concerned, because that court did not decide in this proceeding any federal question involving the searches and seizures. Instead, it simply refused to re-decide the federal questions that had been addressed on direct appeal, and it did so because of the limited nature of the Alabama coram nobis remedy. See, e.g., Ex parte Rudolph, 276 Ala. at 393; Sumners v. State, 366 So. 2d at 340. Therefore, there is no federal question decision to review within the meaning of Supreme Court Rule 17.1(b) and (c).

This Court lacks jurisdiction to review aspects of a state court decision that do not address the merits of any federal question. E.g., Beck v. Washington, 369 U.S. 541, 553 (1962); Bolling v. Lersner, 91 U.S. 594 (1876). More specifically, this Court does not have jurisdiction to review denial of a federal constitutional claim in a state collateral proceeding when the basis of that denial is the limited scope of the state collateral remedy. Woods v. Nierstheimer, 328 U.S. 211 (1946); Adams v. Russell, 229 U.S. 353 (1913) (where state procedural law does not permit re-adjudication of federal question in second proceeding).

Stated somewhat differently, the holding below that matters decided on direct appeal cannot be re-litigated in an Alabama error coram nobis proceeding is a state law basis for the Alabama courts' refusal to grant petitioner relief in this proceeding. This Court has no jurisdiction to review a state court decision based on an independent and adequate state law ground. E.g., Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562, 566 (1977).

Therefore, this Court lacks jurisdiction to review the first five questions presented in the petition, the ones involving the searches and seizures.

II. CERTIORARI SHOULD NOT BE GRANTED ON THE QUESTION INVOLVING BECK v. ALABAMA, 447 U.S. 625 (1980), BECAUSE THE ONLY SUCH QUESTION PRESENTED BY THE EVIDENCE AND DECIDED BELOW WAS CORRECTLY DECIDED

As his sixth question presented for review, the petitioner contends that he is entitled to have his death sentence set aside under Beck v. Alabama, 447 U.S. 625 (1980). Petition at 3 and 9 - 10. That broadly stated federal question is properly presented for review, because it was decided on the merits by the court below. Richardson v. State, 419 So. 2d 289, 292-293 (Ala. Cr. App. 1982). However, this Court should not grant certiorari to review the question because the lower court decided the matter correctly under this Court's precedents.

As Hopper v. Evans, 102 S. Ct. 2049 (1982), clarified and emphasized, this Court's decision in Beck v. Alabama, 447 U.S. 625 (1980), was limited to a holding that a death sentence may not be carried out when the jury that convicted the defendant of the capital offense was not permitted to consider a lesser included non-capital offense verdict, "and when the evidence would have supported such a verdict." 447 U.S. at 627. This Court held in Hopper v. Evans, 102 S. Ct. 2049, 2052-2053 (1982), that the Constitution does not require, and may even prohibit, a lesser offense instruction when there is no evidentiary basis for it.

Under the facts of this case, there was no evidentiary basis for an lesser included non-capital offense verdict at petitioner's trial. As the Court of Criminal Appeals held in affirming the denial of coram nobis relief:

> The appellant's petition for a writ of error coram nobis in this case does not aver that the petitioner was entitled to an instruction of a lesser included offense. There is no evidence before this Court that the petitioner was entitled to

> have the jury instructed on a lesser included offense. There is no evidence before this Court that the evidence presented to the jury at the original trial of the petitioner would have supported a conviction of a lesser included offense. The evidence fully supports the jury verdict that the petitioner intended to kill the victim. We hold that the preclusion clause did not prejudice the petitioner in any way, and that the trial judge did not err when he denied petitioner's petition for a writ of error coram nobis. Hopper v. Evans, supra; Beck v. Alabama, supra; Richardson v. State, Ala.Cr.App. 376 So.2d 205; Ex Parte Richardson, Ala. 376 So.2d 228; Beck v. Alabama, 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132; Summers v. State, supra.

Richardson v. State, 419 So. 2d at 293. Those factfindings are entitled to great weight and are due to be accepted by this Court, absent exceptional circumstances not present here. E.g., California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 111-112 (1980); Whitney v. California, 274 U.S. 357, 367 (1927).

On p. 10 of his certiorari petition to this Court, petitioner belatedly contends that the very existence of the preclusion clause harmed him by affecting his trial strategy. That claim might be deserving of further attention if it had been properly presented and supported by evidence in the court below, see, Hopper v. Evans, 102 S. Ct. at 2054 n., but it was not. Petitioner's coram nobis petition did not even allege that his trial tactics or defense was influenced in any way by the existence of the preclusion clause, nor did petitioner or his trial attorney testify at the evidentiary hearing that the preclusion clause had had any effect. Therefore, the more narrow Beck v. Alabama question petitioner would have this Court review was not decided below nor is it presented by the

facts of this case. Richardson v. State, 419 So. 2d at 293 ("the preclusion clause did not prejudice petitioner in any way.").[3]

The only federal question properly presented and decided in the court below is whether Beck v. Alabama, 447 U.S. 625 (1980), mandates setting aside every pre-Beck capital conviction and death sentence regardless of circumstances. That is the Beck issue petitioner raised in his coram nobis petition, and the Court of Criminal Appeals properly answered it in the negative under Hopper v. Evans, 102 S. Ct. 2049 (1982). The other Beck issue petitioner would have this Court review — whether a pre-Beck capital defendant whose trial strategy was affected by the preclusion clause is entitled to have his conviction or sentence set aside — was not decided in the court below, nor is it presented by the facts of this case.

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[3]Contrary to the implication on p. 10 of the certiorari petition, the State of Alabama has not refused new trials to all pre-Beck capital defendants. Instead, the vast majority of pre-Beck capital convictions and death sentences have been set aside because the trial record or other evidence indicated that the preclusion clause prejudiced the defendants in those cases.

Petitioner's case is one of only twelve Alabama pre-Beck death sentence cases in which there was no evidence at trial and none offered since trial to indicate that the preclusion clause harmed the defendant in any way at all. The other eleven such cases are still pending at one level or another of the Alabama appellate process.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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ALABAMA ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I, Edward E. Carnes, a member of the Bar of the Supreme Court of the United States, do hereby certify that I did serve a copy of this brief on petitioner, by placing a copy in the United States mail, postage prepaid, and properly addressed as follows:

Herbert Lee Richardson
P. O. Box 37
Holman Station, Alabama 36503

I further certify that I have served all parties required to be served.

Done this 4th day of February, 1983.

EDWARD E. CARNES
ASSISTANT ATTORNEY GENERAL

Cite as Ala.Cr.App., 419 So.2d 289

Herbert Lee RICHARDSON

v.

STATE.

4 Div. 956.

Court of Criminal Appeals of Alabama.

June 29, 1982.

Rehearing Denied July 27, 1982.

Certiorari Denied, Oct. 1, 1982
Alabama Supreme Court 81-837.

The Circuit Court, Houston County, Jerry M. White, J., denied petition for writ of error coram nobis seeking to set aside murder conviction and death sentence, and petitioner appealed. The Court of Criminal Appeals, Joseph J. Mullins, Retired Circuit Judge, held that: (1) matters of validity of search warrant, which had been fully adjudicated, could not be again adjudicated by petition for writ of error coram nobis; (2) trial court did not err to prejudice of petitioner when it did not grant a new trial on ground that he was denied counsel; and (3) where there was no evidence that petitioner was entitled to have jury instructed on lesser included offense, where evidence presented to jury at original trial would not have supported conviction of lesser included offense, and where evidence fully supported verdict that petitioner intended to kill victim, failure to permit jury to consider lesser included offense did not prejudice petitioner in any way.

Affirmed.

1. Criminal Law ⇐997.18

Court of Criminal Appeals will not adjudicate again same issues that have already been adjudicated between same parties over and over again on application for writ of error coram nobis, and thus petitioner was not entitled to have matters of validity of search warrants for his automobile and home, which had been fully adjudicated by trial court and on direct appeal, again adjudicated on petition for writ of error coram nobis.

2. Criminal Law ⇐997.16(7)

In absence of averment in petition for writ of error coram nobis that petitioner was denied assistance of attorney at his original trial, and in absence of any evidence showing denial of his right of counsel at his original trial, trial court did not err to prejudice of petitioner when it did not grant him new trial on ground that he was denied counsel.

3. Criminal Law ⇐997.11, 997.15(2)

Petitioner must aver facts, in petition for writ of error coram nobis, which if proven would entitle him to writ and at trial he must prove such facts.

4. Criminal Law ⇐997.18

Where petition for writ of error coram nobis did not aver that petitioner was entitled to instruction on lesser included offense, where there was no evidence that petitioner was entitled to have jury instructed on lesser included offense, where there was no evidence supporting conviction of lesser included offense, and where evidence fully supported jury verdict that petitioner intended to kill victim, preclusion clause did not prejudice petitioner, who was convicted under statute which provides for death or life imprisonment without parole for exploding dynamite when person is intentionally killed by explosion. Code 1975, §§ 13-2-60, 13-2-61, 13-11-1 to 13-11-9, 13-11-2(a)(9) (Repealed).

Herbert Lee Richardson, pro se.

Charles A. Graddick, Atty. Gen., and Elizabeth Ann Evans, Asst. Atty. Gen., for appellee.

JOSEPH J. MULLINS, Retired Circuit Judge.

This appeal is from a denial of a petition for a writ of error coram nobis seeking to set aside appellant's 1978 conviction for murder and a sentence of death. His origi-

nal conviction was appealed from the Houston County Circuit Court to this Court, and on October 3, 1978 the case was remanded to the trial court with instructions. On November 21, 1978, following remand, it was affirmed by this Court, and on December 19, 1978 rehearing was denied. *Richardson v. State*, Ala.Cr.App. 376 So.2d 205. The Supreme Court of the State of Alabama granted certiorari to review appellant's conviction on the ground that it was a death case. Rule 39(c) ARAP, and on September 28, 1979 affirmed the judgment of the Court of Criminal Appeals. On November 6, 1979 petition for rehearing in the Supreme Court was denied. The Supreme Court in affirming the holding of the Court of Criminal Appeals stated that "petitioner's allegations of error: (1) That the initial warrantless search of petitioner's automobile was illegal; (2) That the search of appellant's home was conducted pursuant to an improperly issued search warrant. We find no merit in either contention made by the petitioner." The Supreme Court carefully reviewed the record and found that petitioner's conviction is adequately supported by the evidence. *Ex Parte Richardson v. State of Alabama*, Ala. 376 So.2d 228.

We shall not recite the facts of the crime in this record because they are fully set out in the opinion of this Court in the case of *Richardson v. State*, Ala.Cr.App. 376 So.2d 206.

On April 10, 1981 the petitioner, Herbert Lee Richardson, filed a petition for a writ of error coram nobis in the Circuit Court of Houston County, Alabama. On April 16, 1981 the district attorney of the 20th Judicial Circuit of Alabama filed a motion to dismiss the petition for writ of error coram nobis filed in this cause. On July 2, 1981 the petitioner filed a supplementary amendment to the petition for a writ of error coram nobis. On July 16, 1981 the trial court entered an order appointing a competent attorney to represent the petitioner, setting the time and place for a hearing on the petition, and the motion to dismiss the petition, and directing the Warden at Holman Prison to have the petitioner present so that he and his attorney may present such evidence as may be proper in said cause. On the 18th of September, 1981, with the petitioner, and his counsel, and the state, and its counsel, present in open court, a hearing on the petition was had.

Petitioner's evidence consisted of five witnesses and two exhibits. Petitioner's first witness, Thomas W. Sorrells, district attorney for the 20th Judicial Circuit, State of Alabama, testified, in substance, as follows: That he participated in the investigation that led to the arrest, trial, and conviction of the petitioner; that he accompanied the police to Abbeville to pick up the petitioner, who had been arrested, and to talk to petitioner's fellow employees, and to look around the site where the petitioner had been working; that he did participate in the obtaining of a search warrant for the petitioner's house in Hartford, Alabama; that he related the information given him by Sergeant Lock to Judge Block; that at that time the petitioner was in custody in Dothan; that he was present in the area, but did not participate in the actual search of petitioner's house; that he was not present when petitioner's vehicle was searched.

The petitioner testified, in substance, that the pipe on his job site was all two and a half inch pipe; that two and a half inch pipe would be the inside size of the pipe, and that three inches would be the outside diameter of the pipe; that all pipe at the job site was galvanized; that the only pipe he recalls being at his house was three-quarter inch pipe, and it was not galvanized. On cross-examination petitioner admitted that he was not present when the officer found pipe at his home, and that the pipe described by the police was approximately two inch pipe; that these facts about the size of the pipe came out at his trial.

Doris Weems, petitioner's next witness, testified, in substance, that she went to the scene of the bombing on the 16th day of August, 1977; that she spoke with some officers whose names she did not know, and told them that she had seen a pipe in the

petitioner's car; that she did not recall whether she had told the police about any statements petitioner had made to her since the bombing occurred several years ago.

Petitioner's next witness, Harold Lock, a Dothan police officer, testified, in substance, that he was involved in the investigation which led to the conviction of the petitioner; that the pipe found at the job site where petitioner worked, and the pipe found at petitioner's home were similar to the pipe found at the bomb scene; that the pipe used in the bomb and the pipe found in petitioner's yard both had threads on one end; that Randy Collins had seen a bomb on the front porch immediately after petitioner left the scene of the bombing; that the pipe in the debris of the bomb was broken and twisted, and that he estimated the size of the pipe used in the bomb to be two to two and a half inches, galvanized, and the same type of pipe found at appellant's job site and home.

Petitioner's next witness, L. E. Stokes, a Dothan police officer, testified, in substance, that he obtained a search warrant for petitioner's car; that Randy Collins told Stokes that he saw something on the steps of the house after the petitioner left the scene, but could not recall Collins' description of it.

Petitioner's exhibit one is a drawing of a two-inch galvanized pipe. Petitioner's exhibit two is a drawing of a carbon steel pipe, and a galvanized pipe with nipples on them.

On September 18, 1981 at the conclusion of the evidence offered by the petitioner on his petition for writ of error coram nobis, the trial court being of the opinion that the evidence did not establish that petitioner was entitled to a writ of error coram nobis, therefore, the petition was dismissed. Appellant gave notice of appeal to this Court on September 22, 1981, and requested permission to proceed in forma pauperis, and pro se.

The petitioner contends in his brief that he is entitled to a new trial because: First, that the search warrants issued to search his vehicle and to search his home were issued under false affidavits. Second, that he has been denied his right to an attorney during the preliminary stage of the proceeding when the district attorney was actively involved in the prosecution of the case on the day of the occurrence. Third, that he is entitled to a new trial under the decision rendered in the *Beck* case. *Beck v. State of Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392.

[1] The appellant's first contention in his brief is that he should be granted a new trial because: (1) The affidavits used to obtain the search warrant for his automobile; and (2) The affidavits used to obtain the search warrant for his home were false. This issue was fully submitted by the appellant to the trial court, and there adjudicated, and upon appeal to this Court from his conviction, was affirmed by this Court. See *Richardson v. State*, Ala.Cr.App., 376 So.2d 208, and again confirmed by the Supreme Court of Alabama. See *Ex Parte Richardson*, Ala., 376 So.2d 228. This Court will not adjudicate again the same issues that have already been adjudicated between the same parties, over and over again on an application for a writ of error coram nobis. *Richardson v. State, supra; Ex Parte Richardson, supra; Summers v. State*, Ala.Cr.App., 366 So.2d 336; *Ex Parte Rudolph*, 276 Ala. 392, 162 So.2d 486; *Cert. Den.*, 377 U.S. 919, 84 S.Ct. 1185, 12 L.Ed.2d 88; *Impson v. State*, Ala.Cr.App., 339 So.2d 1098. We hold that the matters of the validity of the search warrants have been fully adjudicated, and the appellant may not again adjudicate them by this petition for a writ of error coram nobis.

The appellant's second contention is that he has been denied his right to an attorney during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day of the occurrence.

We have diligently searched the original petition for a writ of error coram nobis filed in this cause on April 10, 1981, and the amended petition filed July 2, 1981, and do not find a fact stated in the petition, or

amended petition, that the appellant was at any time denied the right of counsel, nor do we find any evidence in the transcript of the hearing on the petition from which a conclusion could be drawn that the appellant was denied right to counsel. We only find the statement in the transcript of the hearing, made by appellant's counsel to the court, that appellant contends that: "Under the Lomax case, which is cited in his petition, that he has been denied his fourth amendment rights, and his rights to an attorney, during the preliminary stages of the proceedings when the district attorney was actively involved in the prosecution of the case on the day that the occurrence happened that gave rise to the indictment." The appellant was represented by counsel at his original trial, and on appeal from his original trial, to this Court, and in the Supreme Court of Alabama. Appellant was represented by counsel at the hearing in the trial court in this case and, on request of the appellant, is represented pro se on this appeal.

[2, 3] We hold that in the absence of an averment in the petition for the writ of error coram nobis, that the appellant was denied assistance of an attorney at his original trial, *and* in the absence of any evidence showing a denial of the appellant's right of counsel at his original trial, the trial court did not err to the prejudice of the appellant when it did not grant him a new trial on the ground that he was denied counsel. Petitioner must aver facts, in his petition for a writ of error coram nobis which, if proven, would entitle him to the writ, and on the trial he must prove such facts. *Summers v. State, supra; Corley v. State*, Ala.Cr.App., 397 So.2d 223; *Cert. Den.*, Ala., 397 So.2d 225.

The third contention contained in appellant's brief is that he is entitled to a new trial because of the opinion of the United States Supreme Court rendered in the case of *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392, decided June 20, 1980.

Appellant avers in his petition that the United States Supreme Court ruled in *Beck v. State* that: "The death sentence may not be constitutionally imposed after a jury verdict of guilt of a capital offense when the jury was not permitted to consider a verdict of a lesser included offense of a non-capital nature."

The appellant was convicted under *Code of Alabama, 1975*, Section 13-11-1—Section 13-11-9. Section 13-11-2(a)(9) provides for the death or life imprisonment without parole for the: "willful setting off or exploding dynamite or other explosive under circumstances now punishable by Section 13-2-60 or 13-2-61, when a person is intentionally killed by the defendant because of said explosion;"

We quote from *Beck*, emphasis supplied.

"We granted certiorari to decide the following question:

'May a sentence of death constitutionally be imposed after a jury verdict of guilt of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, *and when the evidence would have supported such a verdict*?' 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132.

"We now hold that the death penalty may not be imposed under these circumstances."

We note that the *Beck* case specifically held that a death sentence may not constitutionally be imposed after a jury verdict of guilty of a capital offense, when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, *and when the evidence would have supported such a verdict.* In the case of *Joseph S. Hopper, Commissioner, Alabama Department Of Corrections and James D. White, Warden, Petitioners, v. John Louis Evans, III*, — U.S. —, 102 S.Ct. 2049, 72 L.Ed.2d 367 released by the Supreme Court Of The United States, May 24, 1982, Chief Justice Burger said:

"*Beck held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given only when the evidence war-*

rants such an instruction. The jury's discretion is thus channelled so that it may convict a defendant of any crime fairly supported by the evidence. Under Alabama law, the rule in non-capital cases is that a lesser included offense instruction should be given if '*there is any reasonable theory from the evidence which would support the position.*' *Fulghum v. State* 291 Ala. 71, 75, 277 So.2d 886, 890 (1973). The federal rule is that a lesser included offense instruction should be given '*if the evidence would permit a jury rationally to find (a defendant) guilty of the lesser offense and acquit him of the greater.*' *Keeble v. United States*, 412 U.S. 205, 208 [93 S.Ct. 1993, 1995, 36 L.Ed.2d 844] (1973). The *Alabama rule clearly does not offend federal constitutional standards, and no reason has been advanced why it should not apply in capital cases.*'"

Chief Justice Burger further stated in *Hopper v. Evans, supra:* "The evidence not only supported the claim that respondent intended to kill the victim, but affirmatively negated any claim that he did not intend to kill the victim. An instruction of the offense of unintentional killing during this robbery was therefore not warranted."

[4] The appellant's petition for a writ of error coram nobis in this case does not aver that the petitioner was entitled to an instruction of a lesser included offense. There is no evidence before this Court that the petitioner was entitled to have the jury instructed on a lesser included offense. There is no evidence before this Court that the evidence presented to the jury at the original trial of the petitioner would have supported a conviction of a lesser included offense. The evidence fully supports the jury verdict that the petitioner intended to kill the victim. We hold that the preclusion clause did not prejudice the petitioner in any way, and that the trial judge did not err when he denied petitioner's petition for a writ of error coram nobis. *Hopper v. Evans, supra; Beck v. Alabama, supra; Richardson v. State*, Ala.Cr.App. 376 So.2d 205; *Ex Parte Richardson*, Ala. 376 So.2d 228; *Beck v. Alabama*, 444 U.S. 897, 100 S.Ct. 204, 62 L.Ed.2d 132; *Summers v. State, supra.*

The judgment of the trial court is due to be and is hereby affirmed.

The foregoing opinion was prepared by Honorable JOSEPH J. MULLINS, a retired Circuit Judge, serving as a Judge of this Court; his opinion is hereby adopted as that of the Court.

The judgment below is hereby affirmed.

AFFIRMED.

All the Judges concur.

Willie Lee CARTHON, Alias Willie Lee Pryor

v.

STATE.

4 Div. 978.

Court of Criminal Appeals of Alabama.

June 29, 1982.

Rehearing Denied July 27, 1982.

Defendant was convicted before the Circuit Court, Covington County, William H. Baldwin, J., of assault in the first degree, and he appealed. The Court of Criminal Appeals, Joseph J. Mullins, Retired Circuit Judge held that: (1) denial of petition for youthful offender treatment was not abuse of discretion; (2) indictment was sufficient to sustain jury verdict finding defendant guilty of assault in the first degree; (3) voluntary statement made by defendant, a minor, was admissible even though counsel was not present; and (4) defendant was not entitled to new trial on ground that his insanity should be inquired into.

Affirmed.

APPENDIX B

MAILING ADDRESS:
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OFFICE OF
CLERK OF THE SUPREME COURT
STATE OF ALABAMA
MONTGOMERY

October 1, 1982

Re: 81-937
Ex Parte: Herbert Lee Richardson
PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS
(Re: Herbert Lee Richardson vs. State of Alabama)

Appellant Appellee

You are hereby notified that the following indicated action was taken in the above cause by the Supreme Court today:

_____ Appeal docketed. Future correspondence should refer to the above number.

_____ Court Reporter granted additional time to file reporter's transcript to and including

_____ Clerk/Register granted additional time to file clerk's record/record on appeal to and including

_____ Appell_____ granted 7 additional days to file briefs to and including

_____ Appellant(s) granted 7 additional days to file reply briefs to and including

_____ Record on Appeal filed

_____ Appendix Filed

_____ Submitted on Briefs

XXXXX Petition for Writ of Certiorari denied. No opinion. JONES, J. - TORBERT, C.J., MADDOX, FAULKNER, ALMON, SHORES, EMBRY, BEATTY AND ADAMS, JJ., CONCUR.

_____ Application for rehearing overruled. No opinion written on rehearing.

_____ Permission to file amicus curiae briefs granted

_____

10-1-82
wo

Dorothy F. Norwood

Acting Clerk, Supreme Court of Alabama